

How Imperial Is the Supreme Court? An Analysis of Supreme Court Abortion Doctrine and Popular Will

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OUR HISTORY IS replete with attacks on the Supreme Court for frustrating the will of the majority.¹ Depending on the era, the attacks have come both from the left and from the right. President Roosevelt's court-packing scheme, for example, was a reaction to the several Supreme Court decisions striking down New Deal legislation—legislation presumably supported by a majority of Americans.² More recently, the sharpest criticism of the Court has come from the right.

Introduction

Former Judge Robert Bork voiced current anti-Court sentiment when he stated that, "judicial activism is likely to represent an elite minority's sentiment."³ Similarly, other conservatives have attacked the Court as elitist, socially permissive, and out of touch with the majority of Americans.⁴ Criticism has come from within the Court as well. Justice Scalia has accused the Court of substituting its will for that of

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1. See, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting) (declaring that "[t]he Imperial Judiciary lives").

2. See JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 147–48 (3rd ed. 1986). President Roosevelt's proposal was entitled "Reorganization of the Federal Judiciary." See S. 1392, 75th Cong. (1937).

3. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 17 (1990).

4. See Jeremy Rabkin, *Partisan in the Culture Wars*, 30 McGEORGE L. REV. 105 (1998); see also *Romer v. Evans*, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting) (stating that the Supreme Court is a participant in the "culture wars" that divide America and that "in these conflicts, the Court is a systematic partisan for one side—the liberal side").

the voters. In *Romer v. Evans*,⁵ he accused the Court of "imposing upon all Americans" the values of "the elite class from which the Members of this institution are selected."⁶ Like Bork, Scalia sees America engaged in a cultural war in which the Supreme Court sides with the elite class and is thus at odds with the majority of Americans.⁷

Long ago, Justice Frankfurter urged the Supreme Court to act with restraint in order to preserve its limited popular support.⁸ Although the Court's critics cite no empirical support for their view,⁹ the Court often ignores the claim that its rulings lack popular support.¹⁰ The traditional defense disregards the fact that, despite the rhetoric, the Court cannot frustrate the majority will often or for prolonged periods of time. Various institutional or constitutional factors prevent the Court from straying too far from popular will.¹¹

The current attack on the Court runs as follows: insofar as the justices subscribe to the notion of a living Constitution, the Court is not constrained by constitutional text or history. Thus, justices substitute their preferences for those of duly elected legislatures and thereby deprive Court rulings of legitimacy.¹² This article challenges the critics' claim in reference to one particularly controversial area of the law—abortion.

Through analysis of opinion polls over the last quarter-century, this article concludes that the attack on the Court is unfounded.¹³ While Court doctrine on abortion does not entirely mirror public opinion, it does significantly reflect popular will.¹⁴ In fact, where pub-

5. 517 U.S. 620 (1996).

6. *Id.* at 636 (Scalia, J., dissenting).

7. *See id.* at 636–53 (Scalia, J., dissenting); *see also* Rabkin, *supra* note 4, at 105.

8. *See* Mary B. McManamon, *Felix Frankfurter: The Architect of 'Our Federalism'*, 27 GA L. REV. 697, 731–37, 780–83 (1993) (discussing Justice Frankfurter's philosophy of judicial restraint); *but see* Frank B. Cross, *Political Science and the New Legal Realism*, 92 NW. U.L. REV. 251, 276–77 (1997) (stating that Frankfurter used restraint selectively, depending on the issue before the Court); *see also* Fred Rodell, Book Review, 59 YALE L.J. 1013, 1014–15 (1950) (stating that Frankfurter used restraint selectively).

9. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting); *see also* BORK, *supra* note 3, *passim*.

10. *See* discussion *infra* Part I.B.

11. *See infra* notes 47–58 and accompanying text.

12. *See* BORK, *supra* note 3, at 46 (noting that, "[t]here was no Justice on the Court who was not prepared to substitute his opinions for those of elected representatives at some point").

13. *See* discussion *infra* Part IV.

14. *See id.*

lic opinion is clearest, the Supreme Court doctrine is most likely to parallel that sentiment.¹⁵

This conclusion is important because it supports the wisdom of the creation of an independent judiciary. Repeated attacks on the Court as anti-majoritarian risk eroding public support for an independent judiciary. This attack is especially dangerous in the emotionally charged abortion debate.

Part I of this article discusses the critique of the Supreme Court as an anti-majoritarian institution. Part II shows the development and current state of the Supreme Court's abortion case law. Part III discusses the adequacy of using public opinion polls to measure majority sentiment. Part IV compares the Supreme Court's abortion doctrine with polling results over time and concludes that a majority of Americans have supported the general scheme of the Supreme Court's abortion doctrine.

I. The Anti-Majoritarian Debate

To hear Justice Scalia¹⁶ or Robert Bork¹⁷ tell it, the Supreme Court acts with little legitimacy because it routinely frustrates the will of the majority when it strikes down popular legislation. The Court's defenders concede this point, but defend the Court as an institution designed to protect minority rights.¹⁸ This section reviews this debate and argues that however desirable it may be to have a court positioned to protect "discrete and insular minorities"¹⁹ unable to achieve political power, the Court is far less anti-majoritarian than its critics claim. The debate surrounding the Court often contrasts independent Article III judges,²⁰ considered members of the elite, with the legislature, considered the true measure of popular sentiment.²¹ In fact, the legislature often acts contrary to popular will. Failure to recognize that the

15. See, e.g., discussion *infra* Part IV.A.2.

16. See *Romer v. Evans*, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting).

17. See BORK, *supra* note 3, at 16–17.

18. See *infra* note 34.

19. *Carolene Products Co. v. United States*, 307 U.S. 144, 153 n.4 (1938).

20. Compare Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21 (1977) (stating that, "the federal judiciary's insulation from majoritarian pressures makes federal court structurally preferable to state trial court"), with Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (arguing that empirical data suggest parity between state and federal judges in their willingness to enforce federal rights).

21. See *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 520–21 (1990) (Scalia, J., concurring) [hereinafter *Akron II*].

Court does in fact follow majority will leaves the Court open to powerful attack that may undercut its effectiveness.²²

A. The Attacks: The Supreme Court Frustrates Majority Will

At various times in our history, Congress and the President, frustrated by rulings of the Supreme Court, have proposed legislation aimed at undercutting the authority of the federal courts. President Roosevelt's court-packing scheme,²³ various proposals in the 1950s and 1960s ranging from desegregation to school prayer and busing,²⁴ designed to undo Warren Court decisions, and a host of similar statutes in the early Reagan years share a common thesis:²⁵ the Article III judiciary is politically unaccountable and often frustrates the will of the majority.

No doubt, the Court has acted contrary to majoritarian sentiment. Doing justice in a given case may demand a blind eye towards popular will.²⁶ For example, assuring that the government provides due process to a death row inmate may frustrate majoritarian sentiment. The fact that the Supreme Court repeatedly acted in contravention of popular will in striking down New Deal legislation in the mid-1930s is beyond serious historical debate. Furthermore, a majority of Americans undoubtedly opposed many of the Warren Court decisions that bound the States to specific protections found in the Bill of Rights.

Even the Court's sharpest critics recognize a role for judicial independence and do not contend the Court must always respond to

22. See discussion *infra* Part IV; see also *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., concurring and dissenting; joined by Rehnquist, C.J.); see also *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring and dissenting).

23. See NOWAK ET AL., *supra* note 2, at 147-48. President Roosevelt's proposal was entitled "Reorganization of the Federal Judiciary." See S. 1392, 75th Cong. (1937).

24. See GERALD GUNTHER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 58-59 (9th ed. 1975); see also Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 988 (1981-82).

25. See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895-96 (1984) (discussing Congressional proposals aimed at curbing the Supreme Court's appellate jurisdiction in light of dissatisfaction with Supreme Court decisions, and particularly mentioning abortion and busing).

26. See William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 751 (1986) (noting that the courts must decide cases free from popular pressure).

popular sentiment.²⁷ Instead, their contention is that, because activist justices are not constrained by the text or original meaning of the Constitution, those justices are substituting their own value preferences for those of the majority.²⁸ According to Bork and other critics, substituting the values of the cultural elite is not legitimate because those values lack constitutional or majoritarian support.²⁹ Often, the critics cite *Roe v. Wade*³⁰ and the Supreme Court's privacy case law as prime examples of the justices' substitution of their values for those of the majority.³¹

In fact, few issues have generated such constant attack on the Court as abortion. The criticism began with Justice White's dissent in *Roe* which characterized the majority's holding as "an exercise of raw judicial power."³² Since then, criticism of *Roe* has focused on a number of arguments. Chief among these criticisms has been the claim that unelected judges have frustrated the majority's will as reflected in state anti-abortion legislation.³³ The portrayal of unelected,

27. See *id.* at 752 ("No such judge can conscientiously say in so many words, 'I gave you my best judgment when I decided that the Constitution meant thus and so, but since the public overwhelmingly disagrees with my interpretation of the Constitution, I will therefore change my mind'").

28. See BORK, *supra* note 3, at 170. Bork states:

Again, the idea is not that judges should feel free to alter the composition of the House of Representatives or decide that senatorial elections should occur every two years but that they should be free to create new individual rights and so strike down legislation that would be valid under the Constitution as written.

Id.

29. See *id.* at 171 ("The dead, and unrepresentative, men who enacted our Bill of Rights and the Civil War amendments did not thereby forbid us, the living, to add new freedoms. We remain entirely free to create all the additional freedoms we want by constitutional amendment or by simple legislation . . .").

30. 410 U.S. 113 (1973).

31. See BORK, *supra* note 3, at 169 ("*Roe* became possible only because *Griswold* had created a new right, and anyone who reads *Griswold* can see that it was not an adjustment of an old principle to a new reality but the creation of a new principle by *tour de force* or, less politely, by sleight of hand").

32. *Roe*, 410 U.S. at 222 (White, J., dissenting).

33. See JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 33-46 (1979) (arguing that federal judges have frustrated majority sentiment reflected in state anti-abortion laws in effect in every state); see also ELIZABETH ADELL COOK ET AL., BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION 14 (1992) (concluding that "there is some evidence that the *Roe* decision had a moderate polarizing effect on public opinion"); Basile J. Uddo, *The Human Life Bill: Protecting the Unborn Through Congressional Enforcement of the Fourteenth Amendment*, 27 LOY. L. REV. 1079, 1079-80 (1981) (stating that, "abortion was foisted upon the American people by an unelected, life-tenured judiciary, and not adopted by the deliberate workings of the more representative political process").

anti-majoritarian judges thwarting the will of the people is powerful political rhetoric.

B. The Defense: Limiting Judicial Power

The Court's defenders emphasize the role of federal courts in protecting minority rights.³⁴ Rather than challenging the assumption that the Court is anti-majoritarian, the Court's defenders concede the point and argue instead that the role of the Court is defending "discrete and insular minorities"³⁵ from the tyranny of the majority. The Framers of the Constitution created an independent judiciary in order to prevent mob rule from overriding individual liberty.³⁶ Most commentators, even the Court's sharpest critics, recognize that in some instances the judiciary must frustrate the public will in order to do substantial justice.³⁷

Unquestionably, the Court should have the power to do justice that may conflict with the will of the majority. However, the perception that federal courts are routinely out of touch with majoritarian

34. See *Romer v. Evans*, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting). Despite Justice Scalia's scathing dissent in which he accuses the majority of elitism and the imposition of their will upon all Americans, the majority failed to respond to his criticism. In some sense, the majority must remain silent in the face of such accusations. It would be inappropriate to respond that "we are listening carefully to the majority of Americans before we decide the dispute before us." To do so would suggest that the Court was deciding the case based on political rather than legal considerations.

In *Planned Parenthood of S.E. Pa. v. Casey*, Justices O'Connor, Kennedy and Souter justified their decision to reaffirm *Roe* by reference to settled expectations. See *Casey*, 505 U.S. 833, 855–56 (1992). But Justices Stevens and Blackmun saw no need to justify the abortion cases by reference to popular sentiment. See *id.* at 911–22 (Stevens, J., concurring and dissenting); see *id.* at 922–43 (Blackmun, J., concurring and dissenting).

Where the Court has spoken on the subject, for example in cases involving "discrete and insular minorities," the Court seems to take the position that, because the particular minority group has been deprived of political power, the legislation, not the Court, lacks democratic legitimacy. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 716–17 (1985). Many commentators have struggled to reconcile the Court's power to overturn legislation with democratic theory. See *id.*; see also Daniel A. Farber & Phillip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686 (1991) (discussing how Justice Scalia used Ackerman's theory); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-6 (2d ed. 1988). Many of those efforts fail to recognize that instances of the Court's anti-majoritarian holdings are far fewer than generally assumed. See Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279, 283 (1957).

35. *Carolene Products v. United States*, 304 U.S. 144, 153 n.4 (1938).

36. See, e.g., THE FEDERALIST NO. 10 (James Madison) (explaining that the republican form of government avoids the evils of factions and the tyranny of the majority or minority).

37. See Rehnquist, *supra* note 26, at 751 (1986) (recognizing that no conscientious judge should change his or her mind simply based on overwhelming public disagreement).

sentiment has at times threatened a backlash against the Court.³⁸ Arguing that the Constitution empowers the judiciary to protect minority rights concedes too much to the Court's critics.

The Court's critics overstate both the Court's immunity from majoritarian influences and the extent to which the Court strays from majority sentiment. Frequent use of such power cannot be squared with democracy and almost certainly undercuts the Court's legitimacy when it does act contrary to the majority. As Robert Dahl observes, "no amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems."³⁹ Failure to rebut the Court's critics is an unnecessary concession that the Court is anti-majoritarian and worthy of popular distrust.

Certainly, the Constitution creates the opportunity for an independent judiciary. Article III affords lifetime tenure for all federal judges.⁴⁰ The Framers intended Article III to increase the quality of justice by protecting judges from political reprisals.⁴¹ Our constitutional government is a republic, not a democracy—a fact reflected in numerous constitutional protections.⁴² An independent judiciary is one such protection; it allows reflective decision making, free from the passions of the moment.⁴³ The Framers designed an independent judiciary as one check on mob rule, the ugly side of democracy.⁴⁴

38. See NOWAK ET AL., *supra* note 2, at 147–48 (discussing President Roosevelt's proposal to increase the size of the Supreme Court); see also *supra* notes 33–34 and accompanying text; Michael Vitiello and Andrew J. Glendon, *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?*, 31 LOY. L.A. L. REV. 1275, 1277 (1998) (suggesting that "[t]he most draconian demand is the repeal of the lifetime tenure provisions of Article III") (citing H.R.J. Res. 77, 105th Cong. (1997) (providing that an Article III judge may not hold office for more than 10 years without the consent of the Senate)).

39. Dahl, *supra* note 34, at 283.

40. See U.S. CONST. art. III, § 1.

41. See THE FEDERALIST NO. 78 (Alexander Hamilton) ("[F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coördinate branches; and . . . nothing can contribute so much to its firmness and independence as permanency in office."); see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 50–52 (2d ed. 1990) (discussing policy favoring Article III over legislative courts).

42. Various Constitutional protections make our system a republic and thus not fully democratic. For example, each state is afforded two Senators regardless of the size of the State's population. See U.S. CONST. art. I, § 3. Also, the President is not elected by majority vote but rather by electoral votes. See U.S. CONST. amend. XII.

43. See *supra* note 41 and accompanying text.

44. See REDISH, *supra* note 41, at 8.

Judicial review strengthens the power of the Court to protect minority interests. Unpopular decisions are reviewable only by the Court's own reexamination of its doctrine or by the difficult amendment process.⁴⁵ But the idea that federal judges are immune from political reality is wrong as a matter of constitutional design and as a matter of common sense. Common sense tells us that judges are human beings who, as one commentator has said, "'follow[] the election returns.'"⁴⁶

While the Court retains power over the Executive and Legislative branches through judicial review,⁴⁷ the political branches hold sway over the Court beyond their respective roles in the nomination and confirmation process. Congress must allocate resources for the Court to function.⁴⁸ The Court has virtually no independent enforcement power and must rely on the co-operation of the executive branch of the government to enforce its decrees if the parties do not voluntarily comply.⁴⁹ The fact that the President nominates a Justice and the Senate ratifies that choice allows an opportunity for the political branches of government to influence the direction of the Court.⁵⁰

Battles over the personal views of Court nominees, which have been especially visible in our recent history,⁵¹ are ample demonstration that the legislative and executive branches have a voice in directing the Court. The possibility that a Justice may disappoint the

45. See U.S. CONST. art. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

Id.

46. Eric M. Uslaner & Ronald E. Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and States: Changes and Stability After the Roe and Doe Decisions*, 77 MICH. L. REV. 1772, 1772 (1979) (quoting R. CLAUDE, *THE SUPREME COURT AND THE ELECTORAL PROCESS* xiv (1970)).

47. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

48. See U.S. CONST. art. I, § 8.

49. See Vitiello & Glendon, *supra* note 38, at 1297.

50. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, . . . and he . . . shall appoint . . . Judges of the [S]upreme [C]ourt . . .").

51. See LOUIS FISHER ET AL., *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 206-10 (1992) (stating that the Senate questioned Supreme Court nominees Robert Bork and David Souter about their views on the right to privacy, in particular, *Roe v. Wade*).

President who nominated him or her⁵² does not refute the fact that the political branches have an opportunity to influence the Court. And despite great debate over proper criteria for selection of a justice during the Bork nomination,⁵³ the Framers almost certainly expected the political branches of government to consider a nominee's views in making the selection.⁵⁴

While some presidents have selected youthful justices,⁵⁵ most presidents have appointed established lawyers.⁵⁶ Because of that fact, in part, and the number of members of the Court, virtually every president is assured at least one appointment.⁵⁷ The current Court is composed of justices appointed by five different presidents with widely varied political agendas.⁵⁸ The result is that, over relatively short peri-

52. See, e.g., Tony Mauro, *Leak on Souter Keeps McGuigan in Play*, LEGAL TIMES, Sept. 10, 1990, at 10-11 (explaining that President Eisenhower was disappointed in Justice Brennan).

53. See, e.g., Richard D. Friedman, *Balance Favoring Restraint*, 9 CARDOZO L. REV. 15 (1987-88) (using the nomination of Judge Robert H. Bork as an example, the author urges that ideology should play a narrow role in the Senate's consideration of Supreme Court nominees); see also Phillip B. Heymann & Fred Wertheimer, *Why the United States Senate Should Not Consent to the Nomination of Robert H. Bork to be a Justice of the Supreme Court*, 9 CARDOZO L. REV. 21, 22 (1987-88) (noting that because Bork's "nomination represent[ed] a radical rejection of much of the Court's work," Common Cause took the "rare step of opposing a judicial nominee").

54. See Robert Nagel, *A Comment on Democratic Constitutionalism*, 61 TUL. L. REV. 1027, 1029-30 (1987).

'In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote.'

Id. (quoting Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 663-64 (1970)).

55. See THE JUSTICES OF THE UNITED STATES SUPREME COURT—THEIR LIVES AND MAJOR OPINIONS 1908-1910 (Leon Friedman & Fred L. Israel eds., 1997) (showing the ages of former and current Supreme Court Justices. The ages of some of the youngest appointees are: Douglas, J., 40 years old; Stewart, J., 43 years old; Thomas, J., 43 years old; Rehnquist, C.J., 47 years old); see also EDWARD LAZARUS, CLOSED CHAMBERS 228 (1998) ("Reagan succeeded in naming a cadre of unusually young, often enormously gifted ideologues to fill his large reservoir of judicial vacancies").

56. See THE JUSTICES OF THE UNITED STATES SUPREME COURT—THEIR LIVES AND MAJOR OPINIONS, *supra* note 55, at 1908-1910 (noting that the ages of some of the older appointees are: Blackmun, J., 61 years old; Powell, J., 64 years old; Ginsburg, J., 60 years old; Warren, C.J., 62 years old).

57. See Dahl, *supra* note 34, at 284.

58. Chief Justice Rehnquist was appointed by President Nixon as a Justice of the Court and by President Reagan as Chief Justice; Justice Stevens, by President Ford; Justices O'Connor, Scalia and Kennedy, by President Reagan; Justices Souter and Thomas, by President Bush; Justices Ginsburg and Breyer, by President Clinton. See THE JUSTICES OF THE

ods of time, the political branches of government have an opportunity to reshape the Court and to bring it closer to majoritarian sentiment.

Professor Dahl has argued that upholding minority interests over those of national majorities would make the Court "an extremely anomalous institution from a democratic point of view."⁵⁹ In *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, Dahl attempts to measure the extent to which the Court has been able to create policy inconsistent with the will of the national majority.⁶⁰ He concludes that "law-making majorities generally have had their way."⁶¹ In a "very small number of important cases," the Court "delayed the application of policy up to as much as twenty-five years," but never "succeeded in holding out indefinitely."⁶² While some Supreme Court decisions are contrary to the will of the majority, if Dahl's findings are correct, the Court's critics are wrong when they characterize the institution as counter-majoritarian.

C. Preference for Legislative Action: Overstating Legislation as an Expression of the Will of the Majority

Critics of the Court assume that state legislation better reflects majority sentiment than a decision of an Article III court striking down that legislation. For example, Judge Bork has stated that, "[l]egislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment."⁶³

The preference for legislative action ignores a number of ways in which legislation may not reflect majoritarian will. Few legislators are selected for their views on a single issue.⁶⁴ Low voter turnout means that, even if voters select a candidate based on his or her views on a particular issue, that representative's vote on a particular bill may not

UNITED STATES SUPREME COURT—THEIR LIVES AND MAJOR OPINIONS, *supra* note 55, at 1910–11.

59. Dahl, *supra* note 34, at 291.

60. *See id.* at 282.

61. *Id.* at 291.

62. *Id.*

63. BORK, *supra* note 3, at 17; *see Antonin Scalia, Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (stating that a "democratic society does not . . . need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well"); *see also* *Romer v. Evans*, 517 U.S. 620, 636 (Scalia, J., dissenting) ("This Court has no business imposing upon all Americans the resolution favored by the elite class from which members of this institution are selected . . .").

64. CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES* 231 (1989) ("[C]ontrol of Congress and the presidency is based upon coalitions of alliances of . . . [the] interests" of "the law-making majority").

reflect the prevailing sentiment.⁶⁵ Few question that money may skew election results, again making less certain a relationship between popular will and the views of elected officials.⁶⁶ Another reality is that many representatives respond to vocal minorities,⁶⁷ organized groups which flood a representative's office with correspondence favorable to their positions.⁶⁸ Gerrymandered voting districts may sap the political strength of the majority,⁶⁹ as may a gubernatorial⁷⁰ or presidential veto.⁷¹

Thus, the critics' dichotomy between legislation and Court rulings is simplistic. They overstate the Court's ability and willingness to depart from majoritarian sentiment and ignore ways in which legislators frustrate the will of the populace.

Many of these modern critics see *Roe* as prime evidence that the Court is anti-majoritarian.⁷² After all, in 1973, despite some liberalization of state abortion law, no state had a law on the books as permissive as *Roe*.⁷³ Since that time, the Court has frequently struck down state laws regulating abortion.⁷⁴ After a review of twenty-five years worth of abortion cases, this article attempts to measure majoritarian views on abortion to see whether the Court has in fact deviated from popular will.⁷⁵ For the reasons discussed in this section, the author's

65. See Dahl, *supra* note 34, at 283–84.

66. See Dan Baltz, *Clinton Defends Satellite Waiver*, WASH. POST, May 18, 1998, at A1 (reporting that Bill Clinton denied foreign policy decisions affecting China were influenced by political contributions); see also *Not from Companies*, NEWS & OBSERVER, May 22, 1998, at A20 (stating that “a torrential flow of money in politics makes public service an endless chase for funds, keeps many qualified people from taking part, and skews legislation in favor of economic interests”).

67. See COOK ET AL., *supra* note 33, at 199–200.

68. See *id.*

69. See William Booth & William Claiborne, *Lt. Governor Wins Primary in California; Rich Democrats Lag in Bids for Governor*, WASH. POST, June 3, 1998, at A1 (commenting that the California race is especially important because the governor will control reapportionment of congressional districts after the 2000 consensus); see also Ralph Z. Hallow, *GOP's Nervous in California Success in Gubernatorial Primary May Backfire in November*, WASH. TIMES, June 2, 1998, at A6 (noting that the election is “about three things: reapportionment, reapportionment, reapportionment”); Dave Leshner, *California and the West, Stakes Grow Higher in Race for Governor Politics*, LOS ANGELES TIMES, June 15, 1998, at A3 (noting that if democrats continue to hold their majority in the California legislature, Republicans fear lawmakers could join forces with a democratic governor and adopt a new map of political districts that weakens GOP chances substantially).

70. See TEX. CONST. art. IV, § 14; LA. CONST. art. III, § 18.

71. See U.S. CONST. art. I, § 7.

72. See BORK, *supra* note 3; see also NOONAN, *supra* note 33.

73. See NOONAN, *supra* note 33, at 33–34.

74. See COOK ET AL., *supra* note 33, at 2.

75. See discussion *infra* Parts II and IV.

hypothesis prior to collecting data was that the abortion cases would, in fact, closely represent the will of the majority. The research substantiates this position.

II. The Abortion Doctrine

This section reviews Supreme Court abortion case law over the past twenty-five years.⁷⁶ Polling organizations have canvassed the public on several issues, most notably: the general right to an abortion,⁷⁷ informed consent,⁷⁸ parental⁷⁹ and spousal⁸⁰ notification, and public funding.⁸¹ This section discusses the Court's holdings in these areas.

A. The Right to an Abortion

For the first time in 1973, the Supreme Court held that a woman's constitutionally protected right to privacy encompasses the right to terminate a pregnancy.⁸² The Court held that the federal courts should apply strict scrutiny to legislation outlawing abortion.⁸³ Although the source of that right has generated controversy,⁸⁴ *Roe* and its defenders ground it in the Fourteenth Amendment liberty

76. Polling data does not address methods of abortion. Therefore, these issues are not included in this inquiry. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79 (1976) (addressing the state legislature's regulation of abortion methods); see also *City of Akron v. Akron Ctr. for Reproductive Health* [hereinafter *Akron I*], 462 U.S. 416, 436-38 (1983) (discussing the state legislature's regulation of abortion procedures).

77. See *THE GALLUP POLL MONTHLY*, July, 1992, at 52.

78. See *THE GALLUP POLL MONTHLY*, Aug. 1996, at 34.

79. See *id.*

80. See *id.* at 35.

81. See Larry Hugick, *Abortion: Majority Critical of Abortion Decision, but Most Americans Favor Some New Restrictions*, *THE GALLUP REPORT*, July 1989, at 10.

82. See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

83. See *Roe*, 410 U.S. at 155-56.

84. See BORK, *supra* note 3, at 169-70 (stating that the Court found a right to abortion in the constitution without explaining even once how that right could be derived from any constitutional materials); see also *Roe*, 410 U.S. at 174 (Justice Rehnquist, dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)):

[T]he asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' . . .

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Fourteenth Amendment.

Id.; see also *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 983 (1992) (Justice Scalia, dissenting) (stating that "the best the Court can do to explain how it is that the word 'liberty' must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice").

interest.⁸⁵ Even from its first articulation in *Roe*, a woman's right to terminate her pregnancy has never been absolute.⁸⁶ The Court acknowledged a legitimate state interest in preserving and protecting maternal health and the potential life of the unborn child.⁸⁷ *Roe* created a trimester framework to explain the balance between these various interests.⁸⁸

During the first trimester, the decision to terminate a pregnancy rests solely with the woman and her physician.⁸⁹ Maternal health simply cannot justify the state's interference with the woman's right to an abortion in light of data suggesting that mortality in abortion may be less than mortality in normal childbirth.⁹⁰ At the end of the first trimester, according to the Court, a state may regulate abortion as long as the regulation "reasonably relates to the preservation and protection of maternal health."⁹¹ During the final trimester, at the point when a fetus becomes viable, a state may impose significant regulations based on its compelling interest in protecting a potential life.⁹² The Court recognized a state's right to proscribe abortion during the third trimester except when necessary to protect the life or health of the mother.⁹³

Roe has been the subject of some of the most scathing criticism of any Supreme Court decision.⁹⁴ Efforts to overturn *Roe* have galvanized a large segment of the population and have changed many historical voting patterns. Many Catholic voters—largely Democratic voters in this century—have joined historically apolitical, fundamentalist Christians in an effort to overturn *Roe*.⁹⁵ This new voting block found a

85. See *Casey*, 505 U.S. at 846–50 (O'Connor, J., joint opinion); TRIBE, *supra* note 34, § 15-10, at 1341.

86. See *Roe*, 410 U.S. at 154 (noting that "[t]he privacy right involved, therefore, cannot be said to be absolute." At some point in pregnancy, the state's interests in safeguarding health, in maintaining medical standards, and in protecting potential life, "become sufficiently compelling to sustain regulation of the factors that govern the abortion decision").

87. See *id.* at 162–63.

88. See *id.*

89. See *id.*

90. See *id.*

91. *Id.*

92. See *id.*

93. See *id.* at 163–64.

94. See Bork, *supra* note 3, at 169; see also NOONAN, *supra* note 33, at 46; COOK ET AL., *supra* note 33, at 2.

95. See COOK ET AL., *supra* note 33, at 101 (noting that, in regard to their attitudes on legalized abortion, "Catholics and evangelicals were nearly identical by the end of the decade").

home in the Republican party, despite pro-choice majorities within the Republican party.⁹⁶

Ronald Reagan, owing his election in large part to the Christian right,⁹⁷ made a judicial candidate's position on abortion a litmus test.⁹⁸ George Bush, although perhaps not as single minded as his predecessor, demonstrated a similar commitment to the anti-abortion electorate.⁹⁹ Senate judiciary hearings on Supreme Court nominees became national debates on the abortion question with the nominees' positions on *Roe* the topic of many questions,¹⁰⁰ usually finessed by the nominee.¹⁰¹ Together with *Roe* dissenter Justice Rehnquist, Reagan's and Bush's five appointees¹⁰² gave the Court enough votes to overrule *Roe*.¹⁰³

96. See *Bob Dole's Independence Day*, *ECONOMIST*, July 6, 1996, at 19 (noting that "[i]n states up and down the country, from Minnesota to South Carolina, opponents of abortion have seized control of local Republican parties." Currently, the Republican platform opposes all abortion and calls for a constitutional amendment to outlaw it); see also *Intensity Gives Anti-Abortionists a Political Edge*, CNN television broadcast, May 9, 1996, available in LEXIS, News Library, Transcripts File (finding that Polls show most Republicans actually support abortion rights, but abortion opponents have an enormous amount of power because of their intensity and commitment. The abortion issue is more likely to drive their vote. The 12% of voters who said abortion was the number one issue when voting drive the vote. They don't just hold an opinion, they vote their opinions); *Republican Diversity over Abortion Rights is Complex*, National Public Radio broadcast, Nov. 20, 1995, available in LEXIS, News Library, Transcripts File (stating that a recent Wall Street Journal poll confirms that despite there being a substantial majority of Republicans who favor legal abortion, fierce anti-abortion language has been written into the past four Republican presidential platforms because the pro-life minority continues to control).

97. See *Christian Right About to Turn Tables on Republicans*, *HOUS. CHRON.*, June 12, 1998, at A: Outlook (stating that Christian political activists helped sweep Ronald Reagan and George Bush to the White House in the 1980s); see also *Reagan Redux*, *MOTHER JONES*, Nov./Dec., 1998, at 27 (reporting that Ronald Reagan was the candidate of the Christian Right).

98. See LAZARUS, *supra* note 55, at 376-79.

99. See LAZARUS, *supra* note 55, at 373.

100. See *id.* at 441 (referring to Souter, J.); see also FISHER ET AL., *supra* note 51, at 206-10 (noting that senators questioned Bork and Souter about their views on privacy).

101. See LAZARUS, *supra* note 55, at 255 (noting that at the Senate hearings, "Kennedy followed a script that would become standard for future nominees: he endorsed the *idea* that the Constitution included some sort of right to privacy but retreated to meaningless platitudes when pressed to define how extensive that right would be"); see also *id.* at 453 (noting that during his Senate hearings, "Thomas took the now standard avoidance of the *Roe* question to new heights of disingenuousness").

102. Reagan appointed the following Justices: J. O'Connor, 1981; J. Scalia, 1986; J. Kennedy, 1988; President Bush appointed the following Justices: J. Thomas, 1991; J. Souter, 1990. See *THE JUSTICES OF THE UNITED STATES SUPREME COURT—THEIR LIVES AND MAJOR OPINIONS*, *supra* note 55, at 1910-11.

103. See *Roe v. Wade*, 410 U.S. 113, 171-78 (1973) (Rehnquist, J., dissenting).

The Court has twice failed, however, to garner a majority to overrule *Roe*. Sixteen years after *Roe* and after three Reagan appointments to the Court,¹⁰⁴ the Supreme Court faced a direct challenge to *Roe* in *Webster v. Reproductive Health Services*.¹⁰⁵ The Missouri legislation at issue in *Webster* included a preamble setting forth the legislature's findings "that '[t]he life of each human being begins at conception,' and that 'unborn children have protectable interests in life, health, and well-being.'"¹⁰⁶ The legislation's drafters aimed both findings at undercutting *Roe*'s central tenets.¹⁰⁷ The statute also included a provision forcing doctors to determine the state of fetal development,¹⁰⁸ a provision anti-abortion proponents drafted to undercut *Roe*'s trimester scheme.¹⁰⁹

A divided Court declined to overrule *Roe*,¹¹⁰ but the opinion left *Roe*'s future uncertain. Four dissenting justices made clear their continuing support for *Roe*.¹¹¹ Justice O'Connor, who gave the Chief Justice a fifth vote to uphold the statute, refused to reach the core question of the continuing constitutional vitality of *Roe v. Wade*.¹¹² Two changes in Court personnel¹¹³ and a plausible reading of Justice O'Connor's pivotal opinions in recent abortion cases¹¹⁴ left *Roe* espe-

104. Justices O'Connor, Scalia, and Kennedy were appointed during this time period. See THE JUSTICES OF THE UNITED STATES SUPREME COURT—THEIR LIVES AND MAJOR OPINIONS, *supra* note 55, at 1910–11.

105. 492 U.S. 490 (1989).

106. *Webster*, 492 U.S. at 501 (quoting MO. REV. STAT. § 1.205(1)(2) (1986)) (alteration in original).

107. See LAZARUS, *supra* note 55, at 377.

108. See *Webster*, 492 U.S. at 501 (citing MO. REV. STAT. § 188.029 (1986)) (noting that the physician is required to ascertain whether "the fetus is viable by performing 'such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child'").

109. See LAZARUS, *supra* note 55, at 377 (suggesting that "in an effort to break down *Roe*'s trimester framework, the state commanded that when a doctor had reason to believe a fetus was twenty weeks into gestation (well before the third trimester), that doctor must perform tests to determine whether the fetus was viable").

110. See *Webster*, 492 U.S. at 521.

111. The four dissenting Justices who maintained clear support for *Roe* were Marshall, Brennan, Blackmun, and Stevens. See *Webster*, 492 U.S. at 537 (Blackmun, J., concurring and dissenting); see *id.* at 560 (Stevens, J., concurring and dissenting).

112. See *Webster*, 492 U.S. at 525. "When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*." *Id.* at 526.

113. Justices Souter and Thomas were appointed by President Bush. See WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1718 (10th ed. 1997).

114. See *Akron I*, 462 U.S. 416, 452-75 (1982) (O'Connor, J., dissenting); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814-33 (1986)

cially vulnerable. So vulnerable was *Roe* that a three judge panel of the Court of Appeals for the Third Circuit held that *Roe*'s strict scrutiny standard was no longer good law.¹¹⁵

The Pennsylvania statute at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹¹⁶ regulated abortion through a variety of means, including informed consent provisions,¹¹⁷ a twenty-four hour waiting period requirement,¹¹⁸ and parental notification for minors.¹¹⁹ The Third Circuit's analysis would have been different had it employed the prevailing strict scrutiny analysis, rather than the undue burden test the panel now thought the Court favored.¹²⁰ Thus, the Pennsylvania legislation did not directly call *Roe*'s core protection into question. Counsel for Planned Parenthood decided to do so when she asked the Supreme Court to grant writ of certiorari to review a single question: "Has the Supreme Court overruled *Roe v. Wade*, holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?"¹²¹

Casey produced no majority opinion. Apparently, Chief Justice Rehnquist assigned himself the majority opinion with the belief that he now had sufficient votes, if not to overrule, at least to eviscerate *Roe*'s protection of abortion rights.¹²² During post-argument machinations, he lost Justice Kennedy's vote and ended up writing a concurring opinion in which he urged the Court to employ only a rational basis test to determine the constitutionality of state laws regulating abortion.¹²³ A rational basis test would have allowed considerable regulation of abortion, effectively overruling *Roe*. Even by recent stan-

(O'Connor, J., dissenting); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 844-901 (1992).

115. See *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d 682, 687-97 (3d Cir. 1991) (stating that, since the strict scrutiny test of *Roe* no longer commanded a court majority, it should no longer be applied).

116. 505 U.S. 833 (1992).

117. See *Casey*, 505 U.S. at 881-87 (discussing 18 PA. CONS. STAT. § 3205 (1990)).

118. See *id.* at 885.

119. See *id.* at 899-900.

120. See LAZARUS, *supra* note 55, at 459. "[T]he Third Circuit announced that, because *Roe*'s central premise—its high-wattage 'strict' judicial scrutiny test for abortion regulations—no longer commanded a Court majority, it should no longer be applied." *Id.* It substituted O'Connor's undue burden test for strict scrutiny and "tried to guess how she would evaluate it." *Id.* If they had evaluated the statute under strict scrutiny, "all would have failed." *Id.* at 460.

121. *Id.* at 461-62.

122. See *id.* at 468.

123. See *id.* at 472, 482.

dards,¹²⁴ *Casey* divided—no, splintered—the Court. Justices Kennedy, O'Connor, and Souter delivered a joint opinion,¹²⁵ most sections of which gained differing majorities. Justices Blackmun¹²⁶ and Stevens¹²⁷ concurred in part and dissented in part. They disagreed with the joint opinion's imposition of a new standard by which state legislation would be judged.¹²⁸ Most importantly, they disagreed with the abandonment of *Roe*'s trimester analysis.¹²⁹

The joint opinion came as a surprise to most Court watchers because the three-justice block prevented the expected overruling of *Roe*.¹³⁰ The analysis of the joint opinion did, however, give states greater freedom to regulate abortion.

The opinion reexamined *Roe* and, while not explicitly stating that it was doing so, it substituted a more flexible undue burden test for the strict scrutiny test applied in earlier cases.¹³¹ It fastened onto *Roe*'s articulation of the state's "important and legitimate interest in protecting the potentiality of human life,"¹³² an aspect of *Roe* ignored in subsequent decisions which subjected all regulations to strict scrutiny.¹³³ At least some of those cases could not "be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting potential life within her."¹³⁴

The joint opinion summarized a number of the important points governing abortion regulations. First, a court must examine abortion regulation to determine whether it imposes an "undue burden" on a

124. See Kenneth R. Wing, *The Principles & Principals of Abortion Compromise*, 18 J. HEALTH POL. POL'Y. & L. 967, 968 (1993) (noting that "[b]y the late 1980s, the disputes among the justices in abortion cases had become markedly divisive and antagonistic"); Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 69 (1993) (noting that *Casey* revealed deep seated divisions within the Rehnquist court regarding "whether the Constitution protects the right to have an abortion and about the role of precedent in constitutional decisionmaking").

125. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 833 (1992).

126. See *Casey*, 505 U.S. at 922.

127. See *id.* at 911.

128. See *id.* at 920–23 (Stevens, J., concurring and dissenting).

129. See *id.* at 914–15 (Stevens, J., concurring and dissenting); see also *id.* at 929–35 (Blackmun, J., concurring and dissenting) (urging that, "*Roe*'s requirement of strict scrutiny as implemented through a trimester framework should not be disturbed").

130. See Gerhardt, *supra* note 124, at 69 (noting that Court watchers expected the overruling of *Roe* with *Casey* but the unexpected happened—a bare majority, including Justices O'Connor, Kennedy, and Souter, expressly reaffirmed *Roe*).

131. See *Casey*, 505 U.S. at 966 (Rehnquist, C.J., concurring and dissenting).

132. *Id.* at 871 (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973)).

133. See *Casey*, 505 U.S. at 871.

134. *Id.*

woman's decision to terminate her pregnancy prior to viability.¹³⁵ Second, *Roe's* trimester analysis no longer governs abortion cases. The joint opinion specified that, in order to advance its profound interest in potential life, the state may adopt measures to assure that the woman's choice is fully informed and may attempt to persuade the woman to choose childbirth over abortion.¹³⁶ Third, health and safety measures are proper unless they have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.¹³⁷ Fourth, the justices reaffirmed *Roe's* central holding that a woman has a right to terminate her pregnancy prior to fetal viability.¹³⁸ Lastly, with regard to post-viability, the state may regulate or proscribe abortion, except where necessary for preservation of the life or health of the mother.¹³⁹

As observed by Justice Blackmun, if the various regulations had been subject to strict scrutiny, the Court would have found all of the regulations unconstitutional.¹⁴⁰ Hence, to some extent, *Casey* signaled a compromise between a rigid application of *Roe's* standards and efforts to overrule it. Even with regard to *Roe's* core protection, the joint opinion underscored that, although abortion remains a woman's choice, it is subject to some significant lobbying by the state.¹⁴¹

B. Informed Consent

Three years after *Roe*, in *Planned Parenthood of Central Missouri v. Danforth*,¹⁴² the Supreme Court upheld Missouri's informed consent provision.¹⁴³ At a minimum, *Danforth* demonstrated the Court would allow some limited regulation of abortion. *Danforth* found the informed consent provision not only "desirable," but "imperative."¹⁴⁴ Missouri's informed consent law was similar to the informed consent

135. See *id.* at 886.

136. See *id.*

137. See *id.* at 874 (holding that, "[o]nly where State regulation imposes an undue burden on a woman's ability to make this decision does the power of the state reach into the heart of the liberty protected by the Due Process Clause").

138. See *id.* at 846.

139. See *id.*

140. See *id.* at 926 (Blackmun, J., concurring and dissenting) (noting that under the strict scrutiny standard, "the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated").

141. See *id.* at 846.

142. 428 U.S. 52 (1975).

143. See *Danforth*, 428 U.S. at 67.

144. *Id.*

required by other medical procedures in that the physician determined consent on a case-by-case basis.¹⁴⁵ As indicated by the Court, a state may constitutionally mandate such informed consent for any other medical procedures as well as for abortion.¹⁴⁶

By 1982, abortion foes, testing *Danforth's* outer limits, urged a number of states and municipalities to pass informed consent statutes.¹⁴⁷ For example, Ohio's new informed consent statute, at issue in *City of Akron v. Akron Center for Reproductive Health*,¹⁴⁸ specified the information that a physician must give a patient in order to qualify her consent as "informed."¹⁴⁹ The statute required that the attending physician inform the patient that "the unborn child is a human life from the moment of conception."¹⁵⁰ The statute further compelled the physician to describe to the patient "in detail the anatomical and physiological characteristics of the particular unborn child" and to tell her that "abortion is a major surgical procedure."¹⁵¹ The statute also included a mandatory 24-hour waiting period between the execution of

145. *See id.*

146. *See id.*

147. *See generally Akron I*, 462 U.S. 416, 419 (1982) (noting that "[l]egislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a state's authority to regulate the performance of abortions. And arguments continue to be made in these cases as well, that we erred in interpreting the Constitution").

148. 462 U.S. 416 (1982).

149. *See Akron I*, 462 U.S. at 423 (citing CITY OF AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.06 (1978)).

In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows

Id. at 423 n.5 (quoting CITY OF AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.06(B) (1978)).

150. *Id.* at 423 n.5 (quoting CITY OF AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.06(B)(3) (1978)).

[T]here has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

Id.

151. *Id.* (quoting CITY OF AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.06(B) (1978)).

the patient's informed consent and the performance of the procedure.¹⁵²

The Court held these provisions violated the constitutional right to abortion.¹⁵³ According to the Court, the informed consent provisions were unconstitutional in *Danforth* in part because they directed the individual physician to decide what information would be relevant to a particular patient.¹⁵⁴ The Ohio statute went beyond the state's legitimate interest to inform a patient; instead, the state was impermissibly attempting to persuade the patient to forego abortion.¹⁵⁵

In 1986, the Supreme Court held unconstitutional a state's efforts to use informed consent provisions "to intimidate women into continuing pregnancies."¹⁵⁶ Similar to the provision struck down in *Akron I*, the Pennsylvania Abortion Control Act at issue in *Thornburgh v. American College of Obstetricians and Gynecologists*¹⁵⁷ specified information that had to be made available to a woman contemplating an abortion.¹⁵⁸ For example, the state-supplied printed material included anatomical and physiological characteristics of the fetus and a list of agencies of-

152. See *id.* at 424 n.6 (citing CITY OF AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.07 (1978)).

No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed.

Id.

153. See *id.* at 445.

154. See *id.*

155. See *id.* at 443-44.

The validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman. . . . It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. . . .

Viewing the city's regulations in this light, we believe that §1870.06(B) attempts to extend the State's interest in ensuring "informed consent" beyond permissible limits. First, it is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether.

Id.

156. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986).

157. 476 U.S. 747 (1986).

158. See *id.* at 759-60 (noting that 18 PA. CONS. STAT. ANN. § 3205(a) (1982) required "that the woman give her 'voluntary and informed consent' to an abortion. Failure to observe the provisions of § 3205 subject[ed] the physician to suspension or revocation of his license, and subject[ed] any other person obligated to provide information relating to informed consent to criminal penalties" under § 3205(c)).

fering alternatives to abortion.¹⁵⁹ Other required information included "the 'fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care,'" and "the 'fact that the father is liable to assist' in the child's support."¹⁶⁰

According to the Court, Pennsylvania's law ran afoul of its holding in *Akron I* because the law was "designed 'to influence the woman's informed choice between abortion or childbirth.'"¹⁶¹ The printed material was an "outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician."¹⁶² The requirement that the physician provide non-medical information, like available alternatives, was irrelevant to the medical decision that a doctor and a patient must make.¹⁶³ Further, that kind of information did not advance the state's legitimate interest in protecting the woman's health.¹⁶⁴

Although the Court in *Casey* again declined to overrule *Roe's* "core" holding, it did overrule those portions of *Akron I* and *Thornburgh* which dealt with informed consent provisions and twenty-four hour waiting periods.¹⁶⁵ The joint opinion of Kennedy, Souter, and O'Connor provided three votes to overrule these provisions in addition to those justices who would have overruled (or all but overruled) *Roe*.¹⁶⁶

The joint opinion in *Casey* found that *Akron I* and *Thornburgh* went too far in holding that the mandatory dissemination of truthful and not misleading information was unconstitutional.¹⁶⁷ Three justices held that the state does have an interest in protecting potential life and in the health and mental well-being of the woman.¹⁶⁸ Requiring the woman to be fully informed furthers legitimates these interests, "even when in so doing the State expresses a preference for childbirth over abortion."¹⁶⁹ The Court found that Pennsylvania's in-

159. *See id.* at 761.

160. *Id.* at 760-61 (quoting 18 PA. CONS. STAT. ANN. § 3205 (1982)).

161. *Id.* at 760 (quoting *Akron I*, 463 U.S. 416, 443-44 (1983)).

162. *Id.* at 762.

163. *See id.*

164. *See id.* at 763.

165. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. at 882, 887 (1992).

166. *See id.* (O'Connor, Souter and Kennedy, J.J., joint opinion); *see id.* at 968-69 (Rehnquist, C.J., concurring). Chief Justice Rehnquist was joined in his concurring opinion by Justices White, Scalia and Thomas. *See id.* at 944.

167. *See id.* at 882.

168. *See id.* at 871.

169. *Id.* at 883.

formed consent requirement was "a reasonable measure to ensure an informed choice," and, as such, was not "a substantial obstacle to obtaining an abortion."¹⁷⁰ *Casey* departed from earlier case law that, in effect, required the state to remain neutral in its view of abortion.¹⁷¹ Now, the state may make a value judgment expressing a preference for childbirth.

The joint opinion also concluded that the twenty-four hour waiting period was constitutional. It was "a reasonable measure to implement the State's interest in protecting the life of the unborn."¹⁷² Increased costs and potential delays, although "troubling in some respects,"¹⁷³ did "not demonstrate that the waiting period constitut[ed] an undue burden."¹⁷⁴ The statutory exception for medical emergencies alleviated the potential health risks posed by the waiting period.¹⁷⁵ Like the informed consent provision, the waiting period demonstrated the state's preference for childbirth and limited the physician's and patient's discretion. Under the now prevailing undue burden test, the state may do so.¹⁷⁶

Nowhere is the shift in the Court's abortion case law more obvious than in the informed consent and waiting period discussion. Within limits, the state may, in effect, lobby the woman to elect childbirth over abortion.¹⁷⁷ The state may limit discretion by imposing some conditions that would not have withstood earlier strict scrutiny.¹⁷⁸ Further, the state may advance the interest of fetal life, not just maternal health, even during the earliest stages of fetal development.¹⁷⁹

C. Spousal Consent and Notification

The Supreme Court has ruled on two aspects of the father's rights in an abortion decision. In early cases, the Court examined stat-

170. *Casey*, 505 U.S. at 883. The challenge to the physician's First Amendment right not to provide information to his or her patient was quickly dismissed in the joint opinion. *See id.* at 884. The Court recognized that the practice of medicine is always subject to reasonable licensing and regulation by the State. *See id.*

171. *See id.* at 871-77; *but see Akron I*, 462 U.S. at 444 (stating that information disseminated for purposes of informed consent must be only to inform and not to persuade).

172. *Casey*, 505 U.S. at 885.

173. *Id.* at 886.

174. *Id.*

175. *See id.* at 885.

176. *See id.* at 886.

177. *See id.* at 872.

178. *See id.* at 883.

179. *See id.* at 968 (Rehnquist, C.J., concurring).

utes that required spousal consent.¹⁸⁰ Most recently, state attempts to compel spousal notification have been challenged.¹⁸¹ The Court has rejected both efforts as a violation of *Roe*'s core protection.

In *Roe*, Texas law made virtually all abortions illegal.¹⁸² Recognizing the potential argument in favor of a spouse's right to participate in the decision to terminate a pregnancy, the Court explicitly reserved judgment on the constitutionality of a spousal consent provision.¹⁸³

Three years later, in *Danforth*, the Supreme Court considered the constitutionality of a Missouri provision requiring that a woman secure her husband's written consent during the first twelve weeks of pregnancy, unless the woman's life was in danger.¹⁸⁴ The Court held the spousal consent requirement was unconstitutional.¹⁸⁵

Although the Court recognized the "deep and proper concern" of a husband and prospective father,¹⁸⁶ the Court rejected Missouri's spousal consent requirement for two reasons.¹⁸⁷ First, the effect of the statute was to delegate the decision to the husband. Allowing a husband to regulate a wife's choice would be inconsistent with *Roe*'s determination that a woman has an unfettered choice to terminate a pregnancy during the first trimester.¹⁸⁸ Second, the husband's right could not outweigh the pregnant woman's right. As the woman is "more directly and immediately affected by the pregnancy . . . the balance weighs in her favor."¹⁸⁹ The Court also found unpersuasive the state's claim that the statute was intended to foster mutuality and trust in the marriage.¹⁹⁰

In response to *Danforth*, the Pennsylvania legislature added a requirement of spousal notification.¹⁹¹ That provision was apparently designed to circumvent the concern articulated in *Danforth* that a wo-

180. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 (1976).

181. See *Casey*, 505 U.S. 833, 887 (1992).

182. See *Roe v. Wade*, 410 U.S. 113, 117-18 (1973).

183. See *id.* at 165 n.67.

184. See *Danforth*, 428 U.S. at 85 (appendix to the opinion) (quoting H.C.S. HOUSE BILL No. 1211 § 3: "No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except: . . . (3) [w]ith the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother").

185. See *id.*, 428 U.S. at 71.

186. *Id.* at 69.

187. See *id.* at 71.

188. See *id.* at 69.

189. *Id.* at 71 (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

190. See *id.*, 428 U.S. at 71.

191. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 908 (1993) (appendix to the opinion) (quoting 18 PA. CONS. STAT. ANN. § 3209 (1990)). The statute provided:

man's husband not be able to create an absolute obstacle to her decision to terminate her pregnancy.¹⁹² In *Casey*, Planned Parenthood challenged the spousal notification provision.¹⁹³ Justices Blackmun and Stevens joined the opinion authored by Justices Souter, Kennedy, and O'Connor¹⁹⁴ to create a majority striking down the spousal notification provision.¹⁹⁵

The Court declared the spousal notification provision an undue burden on the woman's right to choose.¹⁹⁶ The Court dismissed the commonwealth's argument that the provision did not create an undue burden because "the statute affect[ed] fewer than one percent of women seeking abortions."¹⁹⁷ The Court believed that spouses in well-functioning marriages would discuss whether the wife ought to terminate her pregnancy.¹⁹⁸ Women who would not inform their spouses would most likely fail to do so because the pregnancy was "the result of an extramarital affair," or because "the husband and wife [were] experiencing marital difficulties, often accompanied by incidents of violence."¹⁹⁹ Thus, Pennsylvania's law could have put a woman at risk of physical or emotional harm or both.²⁰⁰

Spousal Notice. (a) Spousal notice required.—In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

Id.

192. See *Danforth*, 428 U.S. at 71.

193. See *Casey*, 505 U.S. at 844.

194. See *id.* at 922 (Blackmun, J., concurring and dissenting); see *id.* at 911-14 (Stevens, J., concurring and dissenting).

195. See *id.*

196. See *id.* at 892-93 (citing the lower court's findings that the notification provision would adversely affect abused women).

197. *Id.* at 894.

198. See *id.* at 892-93.

199. *Id.* at 892.

200. See *id.* at 893-94. The Court went on to discuss the delicate balance between a woman's right to choose and her husband's right to know of that choice. It is an "inescapable biological fact that the state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's." *Id.* at 896. After the child is born, the father of that child does have a legally recognized interest in that child's custody and growth; until then, the woman's rights must prevail. See *id.* at 895-96. The Court clearly rejected the common law view of women as chattel of their husband. See *id.* at 898. No longer is a woman required to advise her husband and obtain his permission before exercising her own personal choices. See *id.* The Court expressed a

D. Parental Consent and Notification

The abortion issue most frequently addressed by the Supreme Court involves the rights of minors and their parents.²⁰¹ While states have attempted a variety of restrictions, the Supreme Court has continued to follow the basic structure first articulated by the Court in 1976 in *Bellotti v. Baird*,²⁰² upholding parental consent and notification provisions as long as the state provides for alternative procedures in some cases.²⁰³

In *Danforth*, although the Court recognized that minors do not always receive the same constitutional protections as adults²⁰⁴ and that states have broad authority to regulate conduct of minors,²⁰⁵ the Supreme Court found a "blanket" parental consent requirement unconstitutional.²⁰⁶ Under Missouri law, any unmarried minor had to secure the consent of one parent before she could terminate her pregnancy.²⁰⁷ The Court rejected the state's asserted interest in safe-

fear of the infamous "slippery slope" in that first we require notice of abortion, then notice of birth control use, then women would be required to get permission to drink alcohol, and so on. *See id.*

201. The Court has considered a total of 10 cases regarding parental notification or consent: *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Casey*, 505 U.S. 833 (1992); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Akron II*, 497 U.S. 502 (1990); *Akron I*, 462 U.S. 416 (1983); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979) [hereinafter *Bellotti II*]; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); and *Bellotti v. Baird*, 428 U.S. 132 (1976) [hereinafter *Bellotti I*]. In stark contrast, the Court has only considered two cases regarding spousal rights: *Danforth* and *Casey*, and, only two cases regarding regulation of abortion methods: *Danforth* and *Akron I*. Twenty-four hour waiting periods have only been reviewed by the Court on two occasions: *Akron I* and *Casey*. The issue of informed consent has only been before the Court four times: *Danforth*, *Akron I*, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *Casey*. Finally, statutes which prohibit public funding for abortions have only been reviewed by the Court four times: *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Beal v. Doe*, 432 U.S. 438 (1977); and *Maher v. Roe*, 432 U.S. 464 (1977).

202. *Bellotti I*, 428 U.S. 132 (1976).

203. *See Bellotti I*, 428 U.S. at 147.

204. *See Danforth*, 428 U.S. at 74.

205. *See id.* at 74-75.

206. *See id.* at 74.

207. *See id.* at 85 (appendix to opinion) (quoting H.C.S. HOUSE BILL NO. 1211, § 3(4)). The statute provided:

No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except . . . (4) [w]ith the written consent of one parent . . . if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Id.

guarding the family unit and parental authority.²⁰⁸ The "veto power" created by the requirement was unlikely to advance the state's asserted interests.²⁰⁹ The Court did imply that a state might tailor its law more closely to its legitimate interests.²¹⁰

In *Bellotti I*, the Supreme Court distinguished Massachusetts's parental consent law from the consent law involved in *Danforth*.²¹¹ Massachusetts provided for a judicial bypass "for 'good cause shown,'" ²¹² whereby a minor, unable to secure the consent of one of her parents, could petition the court for the right to terminate her pregnancy.²¹³ However, no clear parental consent doctrine emerged because the Court did not determine whether the statute was nonetheless unconstitutional as an undue burden on a minor's right to obtain an abortion.²¹⁴ Conflicting interpretations of the statute made it uncertain whether the statute would be upheld.²¹⁵ Thus, according to the Court, the district court should have abstained from ruling on the constitutionality of the statute pending a definitive ruling by the Massachusetts courts.²¹⁶

Three years later, the Court reviewed the same controversy.²¹⁷ In *Bellotti v. Baird*,²¹⁸ the Court concluded that a blanket provision re-

208. *See id.* at 75.

209. *See id.*

210. *See id.*

211. *See Bellotti I*, 428 U.S. 132, 145 (1976).

212. *Id.* at 134-35 (quoting MASS. GEN. LAWS ANN., ch.112, § 12P (West 1974)).

213. *See id.*

214. *See id.* at 146.

215. *See id.* at 148. The first interpretation protected minors from arbitrary refusal of a parent's consent. On the one hand, the interests of the minor were protected because a parent should only consider the minor's best interest when deciding whether to consent. *See id.* at 144. On the other hand, if a minor could demonstrate sufficient maturity she could obtain a judicial bypass without parental counseling. *See id.* Finally, under the first interpretation, a minor's interests were protected because even a minor determined to be legally immature could obtain judicial consent if the judge believed the abortion would be in the minor's best interests. *See id.* at 145. The second interpretation suggested that the parents were empowered with influence comparable to a veto because of the burdensome nature of the judicial bypass. *See id.* at 146.

216. *See id.* at 146.

217. *See Bellotti II*, 443 U.S. 622, 625 (1979) (citing Mass. Gen. Laws Ann., ch.112, § 12S (West Supp. 1979)). The statute provides:

If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. . . .

Id. (alteration in original).

218. *Bellotti II*, 443 U.S. 622 (1979).

quiring all minors to obtain parental consent was unconstitutional.²¹⁹ Justice Powell's plurality opinion concluded that for a parental consent statute to survive, the state must provide an alternative procedure whereby the minor can obtain the necessary authorization.²²⁰ The bypass must allow the minor to show either that she is sufficiently mature to make the decision independently of her parents or that the abortion would be in her best interest.²²¹ The state must also guarantee an expeditious decision and the minor's anonymity.²²² While some aspects of the Massachusetts statute complied with the plurality's criteria, the Court found that two sections of the law violated *Roe*.²²³ First, the law did not allow the minor to petition the court without first giving notice to her parents.²²⁴ Second, the law also allowed a judicial veto of a mature minor's decision to have an abortion.²²⁵

Two years later, in *H.L. v. Matheson*,²²⁶ the Court upheld a Utah parental notification provision.²²⁷ Since the plaintiff did not allege that she was an emancipated or mature minor, the Court considered the constitutionality of the statute as applied to a minor who was "living with and dependent upon her parents," who was "not emancipated by marriage,"²²⁸ and who had made "no claim or showing as to her maturity or as to her relations with her parents."²²⁹ The Court held that although a state may not constitutionally impose a "blanket, unreviewable power of parents to veto their daughter's abortion" decision,²³⁰ a "'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor."²³¹ Since the Utah law did not create a parental veto over the minor's decision and did provide for a judicial alternative, the Court upheld the law.²³²

Justice Powell, in his concurring opinion,²³³ underscored that the Court left open whether a statute violates a minor's constitutional

219. See *Bellotti II*, 443 U.S. at 643 (citing *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

220. See *id.* at 643.

221. See *id.* at 643-44.

222. See *id.* at 644.

223. See *id.* at 651.

224. See *id.*

225. See *id.*

226. 450 U.S. 398 (1981).

227. See *Matheson*, 450 U.S. at 413.

228. *Matheson*, 450 U.S. at 407.

229. *Id.*

230. *Id.* at 409.

231. *Id.* (quoting *Bellotti II*, 443 U.S. 622, 640 (1979)).

232. See *id.* at 413.

233. See *id.* at 413-20 (Powell, J., concurring).

rights if it does not allow the adolescent to avoid parental notification where that notification would not be in the minor's best interests.²³⁴

After *Matheson*, in a string of decisions between 1983 and 1990, the Court reviewed a number of state statutes that attempted to limit a minor's right to an abortion.²³⁵ The Court upheld the laws, even if the laws required parental consent,²³⁶ provided they allowed for judicial bypass, whereby a minor could demonstrate that she was sufficiently mature or, alternatively, that terminating the pregnancy would be in her best interest.²³⁷ The increasing split among the Justices became notable. No single justice could secure a majority for an entire opinion.²³⁸

Twice during the 1980s and 1990s, the Court has produced clear majorities in cases involving minors and parental consent requirements.²³⁹ In *Casey*, seven justices agreed that Pennsylvania's provisions governing parental consent were constitutional.²⁴⁰ While the Court found parts of the law did impose an undue burden on a woman's right to choose,²⁴¹ the consent provision, requiring the informed consent of one parent, was upheld because the law provided for adequate judicial bypass procedures.²⁴² In *Lambert v. Wicklund*,²⁴³ a unanimous Supreme Court upheld Montana's Parental Notice of Abortion Act.²⁴⁴ The act requires the physician provide a minor's parent(s) with forty-eight hours' notice prior to performing the abortion.²⁴⁵ The Montana law allows a minor to seek a judicial waiver of this notice require-

234. See *id.* at 420 (Powell, J., concurring).

235. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Akron II*, 497 U.S. 502 (1990); *Akron I*, 462 U.S. 416 (1983); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti II*, 443 U.S. 622 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Bellotti I*, 428 U.S. 132 (1976).

236. See *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 492-93 (1983).

237. See *Ashcroft*, 462 U.S. at 490-93.

238. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); see also *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

239. See *Casey*, 505 U.S. 833 (1992); see also *Lambert v. Wicklund*, 520 U.S. 292 (1997).

240. See *Casey*, 505 U.S. at 899-900 (O'Connor, Kennedy and Souter, J.J., joint opinion); see also *id.* at 944, 971 (Scalia, J., concurring and dissenting, joined by Rehnquist, C.J., and Thomas and White, J.J.).

241. See *id.* at 895. The spousal notification provision is an undue burden because "it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.*

242. See *id.* at 899. "Under these precedents [*Akron I*, 462 U.S. 416, 440 (1983); *Akron II*, 497 U.S. 502, 510-19 (1989); *Bellotti II*, 443 U.S. 622, 643-644 (1979)], in our view, the one-parent consent requirement and judicial bypass procedure are constitutional." *Id.*

243. 520 U.S. 292 (1997).

244. See *Lambert*, 520 U.S. at 299.

245. See *id.* at 293 (citing MONT. CODE ANN. §§ 50-20-204 to -212 (1995)).

ment.²⁴⁶ Measured against the requirements established in *Bellotti II*, the act withstood constitutional challenge.²⁴⁷

Despite some disagreement concerning the burden imposed by particular statutory schemes,²⁴⁸ the legal principles governing parental consent and notification have remained consistent over the past twenty years.²⁴⁹ A majority of justices have consistently upheld state statutes that call for parental consent or notification as long as the statute offers an alternative procedure for a minor to obtain an abortion.²⁵⁰ Those procedures must meet the criteria established in *Bellotti II*. Specifically, a judicial bypass must be confidential and expeditious.

246. *See id.*

247. *See id.* In addition to guaranteeing a minor's anonymity and an expeditious handling of her petition, Montana's judicial bypass provision directed the court to grant the petition if it found any one of the following conditions: "(i) the minor [was] 'sufficiently mature to decide whether to have an abortion'; (ii) 'there [was] evidence of a pattern of physical, sexual, or emotional abuse' . . . ; or (iii) 'the notification of a parent or guardian [was] not in the best interests of the [minor].'" *Id.* at 294 (quoting MONT. CODE ANN. §§ 50-20-212(4), (5) (1995)). It was argued that the third provision was unconstitutionally narrow because, as written, the provision did not require the authorization of a waiver whenever an abortion was determined to be in the minor's best interests. *See id.* at 297-98. Rather, the provision required a minor to demonstrate that notification would not be in her best interests. *See id.* The critical question, then, was whether the second condition satisfied the *Bellotti II* requirement that a minor be allowed "to bypass the consent requirement if she establishe[d] that the abortion would be in her best interests." *Id.* at 295; *see also Bellotti II*, 443 U.S. 622, 643-44 (1979). The Court relied on its analysis in *Akron II* in which the Court upheld a substantially similar bypass provision by equating the requirement that a minor show notice was not in her best interests with one requiring a minor to show an abortion, without notice, was in her best interests. *Lambert*, 520 U.S. at 295-96 (citing *Akron II*, 497 U.S. 502 (1989)). Justice Stevens disagreed with the Court's reasoning because it suggested a minor must show that an "abortion without notification is in her best interests." *Lambert*, 520 U.S. at 302 (Stevens, J., concurring). According to Justice Stevens, if a minor had already shown an abortion would be in her best interests, it may follow that notice would not be in her best interests. *Id.* at 301 n.*. This is so because a minor who is opposed to the notice requirement could be deterred from seeking an abortion which a court had already determined to be in her best interests. *See id.* at 302 n.*. Furthermore, Justice Stevens pointed out that under the plain language of the statute, if a minor could show notification was not in her best interests, she would not be required to further show that an abortion would be in her best interests. *See id.* at 302. Thus, either showing satisfied the conditions of the Montana provisions and met the *Bellotti II* requirement. *See id.*

248. *See, e.g., Akron II*, 497 U.S. 509, 527 (1989) (Blackmun, J., dissenting) (describing the statutory scheme as an "obstacle course" for minors to complete before they can exercise their rights).

249. *See, e.g., Bellotti I*, 428 U.S. 132 (1976); *see also Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

250. *See, e.g., Casey*, 505 U.S. at 899 (O'Connor, Kennedy and Souter, J.J., joint opinion); *see id.* at 944 (Scalia, J., concurring and dissenting, joined by Rehnquist, C.J., and White and Thomas, J.J.).

tious.²⁵¹ It must also allow a mature minor to show that she is capable of making an informed decision without parental guidance, or failing that, that an abortion would be in her best interest.²⁵²

E. Use of Public Funds, Employees, and Facilities

The Supreme Court has addressed the use of public resources for abortion services in three contexts. First, the Supreme Court considered whether states could legally deny Medicaid assistance for non-therapeutic abortions under Title XIX.²⁵³ Second, the Court determined the constitutionality of the Hyde Amendment which prohibited the use of Medicaid funds to reimburse recipients for the costs of abortions.²⁵⁴ Third, the Court examined a Missouri state regulation that prohibited performance of abortions by public employees and that banned the use of public facilities for abortion procedures.²⁵⁵ The Court has consistently ruled in favor of legislation that limits abortion funding.²⁵⁶

1. Medicaid Assistance for Non-Therapeutic Abortions Under Title XIX

In 1977, the Court examined three cases challenging the validity of state-imposed restrictions on Medicaid assistance for abortion services.²⁵⁷ In each case, the Court held that the state's interest in encouraging childbirth was sufficiently compelling to justify the restriction.²⁵⁸

In *Beal v. Doe*,²⁵⁹ the Court considered whether Title XIX required states to fund non-therapeutic abortions. Title XIX directed participating states to "establish 'reasonable standards . . . for determining . . . the extent of medical assistance'" which are consistent with Title XIX's objectives.²⁶⁰ The Pennsylvania regulation limited

251. See *Lambert*, 520 U.S. at 294-95; see also *Akron II*, 497 U.S. at 512; *Bellotti II*, 443 U.S. at 644.

252. See *Akron I*, 462 U.S. 416, 439-40 (1983) (citing *Bellotti II*, 443 U.S. at 643-44).

253. See *Beal v. Doe*, 432 U.S. 438, 440 (1977).

254. See *Harris v. McRae*, 448 U.S. 297, 301 (1980).

255. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509-10 (1989).

256. See *Beal*, 432 U.S. at 445-47; *Maher v. Roe*, 432 U.S. 464, 478-80 (1976); *Poelker v. Doe*, 432 U.S. 519, 521 (1977); *Harris*, 448 U.S. at 326; *Webster*, 492 U.S. at 507.

257. See generally *Beal*, 432 U.S. at 438; *Maher*, 432 U.S. at 464; *Poelker*, 432 U.S. at 519.

258. See *Beal*, 432 U.S. at 446-47; *Maher*, 432 U.S. at 479-80 (1977); *Poelker*, 432 U.S. at 521; *Harris*, 448 U.S. at 326; *Webster*, 492 U.S. at 507-08.

259. 432 U.S. 438 (1977).

260. *Beal*, 432 U.S. at 441 (quoting 42 U.S.C. § 1396a(a)(17) (1970 ed., Supp. V)).

Medicaid assistance to "medically necessary" assistance.²⁶¹ The Court found that Title XIX gives the states broad discretion when it allocates Medicaid funds.²⁶² According to the Court, Pennsylvania's restriction was reasonable because the commonwealth had a valid interest in protecting human life throughout a woman's pregnancy.²⁶³ Thus, the restriction was reasonable within the meaning of Title XIX. Had the regulation not recognized an exception for medically necessary abortions, it may have violated the act.²⁶⁴

The grant of certiorari in *Beal* was limited to that statutory question.²⁶⁵ The Court considered whether a regulation favoring childbirth over abortion violated Fourteenth Amendment Equal Protection in *Maher v. Roe*,²⁶⁶ a companion case to *Beal*.²⁶⁷ In *Maher*, the plaintiffs challenged a Connecticut regulation similar to that in effect in Pennsylvania which limited abortions to those deemed medically necessary.²⁶⁸

The Court determined that the district court erred when it held abortion was a fundamental right and subjected the regulation to strict scrutiny.²⁶⁹ Instead, the Supreme Court reaffirmed its finding that indigence is not a suspect classification, which included indigent, pregnant women. Therefore, the district court should have determined only whether the state had a rational basis for imposing the "medical necessity limitation" of Medicaid spending.²⁷⁰ The Court held that the state's time-honored interest in protecting potential life was sufficient to justify the regulation.²⁷¹ The failure to fund non-therapeutic abortions was not equivalent to a direct interference with the right to have an abortion protected by *Roe*.²⁷²

Poelker v. Doe,²⁷³ the third case in the trilogy, upheld a directive issued by St. Louis's mayor which prohibited the use of public re-

261. *Id.*

262. *See id.* at 444.

263. *See id.* at 445-46.

264. *See id.* at 444 (stating that if the regulation had not recognized an exception for medically necessary abortions "serious statutory questions might be presented").

265. *See id.* at 443-44.

266. 432 U.S. 464 (1976).

267. *See Maher*, 432 U.S. 467, 470 (1977).

268. *See id.* at 466-67.

269. *See id.* at 471.

270. *See id.* (stating that the court "has never held that financial need alone identifies a suspect class for purposes of equal protection analysis") (citing *San Antonio Sch. Dist v. Rodriguez*, 411 U.S. 1, 29 (1973)).

271. *See id.* at 478.

272. *See id.* at 474.

273. 432 U.S. 519 (1977).

sources for abortion services.²⁷⁴ The Court found that *Maher* controlled the issue.²⁷⁵

2. The Constitutionality of the Hyde Amendment

In 1976, Congress adopted a ban on the use of federal funds for abortion services with limited exceptions.²⁷⁶ *Harris v. McRae*²⁷⁷ challenged the constitutionality of that ban.²⁷⁸ The Court relied on *Maher* and rejected the plaintiffs' challenge to the Hyde Amendment on the grounds that it interfered with a Fifth Amendment due process²⁷⁹ right to an abortion.²⁸⁰ The denial of public assistance is not equivalent to interfering with the decision to terminate a pregnancy.²⁸¹ The Hyde Amendment²⁸² was more restrictive than the state regulations upheld in *Beal*²⁸³ and *Maher*.²⁸⁴ The Hyde Amendment did not create a general exception for medically necessary abortions.²⁸⁵ This made no difference to the Court's analysis.²⁸⁶ Instead, the fact that a woman has a fundamental right to an abortion does not imply an affirmative right to government funds in furtherance of that choice.²⁸⁷ As in *Maher*, the Court rejected the argument that a court must subject "selective subsidization" of some medical procedures to

274. *Poelker*, 432 U.S. at 521.

275. *See id.*

276. *See Harris v. McRae*, 448 U.S. 297, 302 (1980).

277. 448 U.S. 297 (1980).

278. *See id.* at 301-02.

279. U.S. CONST. amend. V (providing that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law").

280. *See Harris*, 448 U.S. at 318.

281. *See id.* at 317 n.19 (citing *Maher v. Roe*, 432 U.S. 464, 474, 474 n.8 (1977)).

282. *See Harris*, 448 U.S. at 302 (citing Pub. L. No. 96-123, § 109, 93 Stat. 926).

[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Id.

283. *See Beal v. Doe*, 432 U.S. 438, 447 (1977).

284. *See Maher v. Roe*, 432 U.S. 464, 474 (1977).

285. *See Harris*, 448 U.S. at 316-17.

286. *See id.*

287. *See id.* at 317-18. Appellees argued that the Hyde Amendment violated the Establishment Clause because the amendment incorporated Roman Catholic Church doctrines into the law. *See id.* at 319. Appellees also challenged the amendment on the basis that it violated the Free Exercise Clause because a "woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant or Jewish tenets." *Id.* The Court dismissed both First Amendment challenges on the basis that although the Hyde Amendment coincides with Roman Catholic doctrines, its primary purpose is the allocation of public money. *See id.* at 319-20. Thus, because the law's primary

strict scrutiny.²⁸⁸ The Hyde Amendment did not affect a constitutionally suspect classification and was rationally related to a legitimate governmental objective.²⁸⁹

3. Public Employees and Facilities

In 1989, a divided Court upheld a Missouri statute which prohibited public employees from performing abortions and banned the use of public facilities for non-therapeutic abortion services.²⁹⁰ By a 5-4 vote, a majority of the Court upheld those provisions.²⁹¹ The majority found the restrictions to be within the Court's analysis in *Maher* and *Poelker*.²⁹² That is, the state law did not impose an obstacle to procuring an abortion. Insofar as the Missouri statute reflected a preference for childbirth, the Court found this a permissible state interest.²⁹³

F. Generalizations

After twenty-five years of litigation and significant changes in the make-up of the Court, some general principles have remained constant. Despite Presidents Reagan's and Bush's aggressive efforts to reshape the Court for the specific purpose of overruling *Roe*,²⁹⁴ the Court continues to recognize a woman's fundamental right to abortion.²⁹⁵ That right, however, is limited when the state has a sufficiently important competing interest.²⁹⁶ While a majority of the Court has abandoned the trimester framework,²⁹⁷ the woman's interest remains strongest in her first trimester and diminishes over time. Viability is the moment when the state's interest in protecting life is most compelling.²⁹⁸

The Court has always recognized that a state may—and ought to—assure a woman's informed consent prior to an abortion.²⁹⁹ Over

purpose is secular, neither advancing nor inhibiting religion, it does not violate the First Amendment. *See id.*

288. *Id.* at 321–22.

289. *See id.* at 322–23.

290. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507–09 (1988).

291. *See id.* at 498, 511.

292. *See id.* at 508–09.

293. *See id.* at 508–09.

294. *See discussion supra* Part II.A.

295. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (O'Connor, Kennedy and Souter, J.J., joint opinion).

296. *See discussion supra* Parts II.A and B.

297. *See supra* note 129 and accompanying text.

298. *See discussion supra* Part II.A.

299. *See discussion supra* Part II.B.

time, the Court has abandoned its insistence on state neutrality between abortion and childbirth.³⁰⁰ It now allows the state to express a preference for childbirth by requiring health care providers to give women seeking an abortion information designed to persuade them to give birth rather than to terminate a pregnancy.³⁰¹ The Court will uphold such measures provided they do not amount to an undue burden on the woman's right to choose.³⁰²

The Court has consistently prevented states from imposing either a spousal consent or spousal notification requirement.³⁰³ A consent requirement is, in effect, a third party veto in conflict with a woman's right to choose. A notification requirement cannot be justified by any of the asserted state interests.³⁰⁴

In contrast, the Court has consistently upheld parental consent and notification provisions as long as those laws contained basic protections.³⁰⁵ Specifically, the Court requires a guarantee of judicial bypass for mature minors or when consent or notification are in conflict with the minor's best interests.³⁰⁶

Finally, the Court has consistently upheld provisions that deny the use of public resources for abortion procedures.³⁰⁷ Essentially libertarian in its view,³⁰⁸ the Court has determined that the state and federal governments cannot interfere with a woman's right to choose, but governments also cannot be compelled to provide funds for her to obtain an abortion.³⁰⁹

III. Reliance on Polls

Supreme Court justices and commentators, who criticize *Roe* and other decisions as being anti-majoritarian, argue that legislation is the measure of democracy. Thus, when the Court overturns legislation, it is acting contrary to popular will.³¹⁰ If one assumes that legislation reflects majoritarian sentiment, one cannot doubt this conclusion.

300. See *id.*

301. See *id.*

302. See *id.*

303. See discussion *supra* Part II.C.

304. See *id.*

305. See discussion *supra* Part II.D.

306. See *id.*

307. See discussion *supra* Parts II.E.1-2.

308. See *TRIBE*, *supra* note 34, at 1345-47 (criticizing the Court's position).

309. See discussion *supra* Parts II.E.1-2.

310. See discussion *supra* Part II.

However, legislation does not always reflect majoritarian sentiment³¹¹ as reflected in public opinion polls. Polls, of course, have limitations. This section reviews some of those limitations. In the final analysis, however, this article uses polling data because they are the only meaningful way to measure popular sentiment. Further, despite obvious flaws, polls that produce similar responses over time suggest some measure of accuracy.

A. Limits of Polling Data

The mass media is addicted to polling data and about 75% of Americans—polled, of course!—believe that opinion polls are a good thing.³¹² At best, public opinion polls are a rough measure of majority sentiment. All polls suffer from some flaws, including sampling errors, design errors, non-availability rates, and refusal rates.³¹³ Among other problems, questions may be poorly worded or placed in a bad sequence.³¹⁴

Pollsters routinely report sampling error; that is, they report the percentage margin of error in a given sample.³¹⁵ However, more substantial problems may undercut the value of any given poll. The most significant errors, perhaps, relate to the form, wording, and context of survey questions.³¹⁶ Complex issues pose difficult problems for pollsters. If the issue is complex, the typical question asking whether one favors or opposes a stated position is a poor measure of that person's opinion.³¹⁷

As observed by one commentator, "results of a survey vary significantly with rather inconspicuous changes in wording and format."³¹⁸ For example, in a 1985 survey on abortion, the pollster asked three different questions. The first question was: "What do you think about abortion? Should it be legal as it is now, legal only in such cases as saving the life of the mother, rape or incest, or should it not be permitted at all?"³¹⁹ The second question asked: "Which of these state-

311. See discussion *supra* Part I.C.

312. See Alva Stewart, *Public Opinion Polls: Benefits and Dangers: A Brief Checklist*, in PUBLIC ADMINISTRATION SERIES: BIBLIOGRAPHY # P 2641 at 2 (1989) (stating that "three out of four Americans believe opinion polls are a good thing").

313. See *id.* at 3–4.

314. See *id.*

315. See MICHAEL WHEELER, LIES, DAMN LIES, AND STATISTICS 272–73 (1976).

316. See Stewart, *supra* note 312, at 3–4.

317. See WHEELER, *supra* note 315, at 279–80.

318. *Id.* at 282.

319. HERBERT ASHER, POLLING AND THE PUBLIC, WHAT EVERY CITIZEN SHOULD KNOW 98 (4th ed. 1998).

ments comes closest to your opinion? Abortion is the same thing as murdering a child, or abortion is not murder because a fetus isn't really a person."³²⁰ The third question asked: "Do you agree or disagree with the following statement? Abortion sometimes is the best course in a bad situation."³²¹

One would predict that if a majority favored abortion in question one, a majority would also conclude that abortion is not murder. However, the responses contained some surprises: 40% supported abortion and wanted it to remain "[l]egal as is now," while 40% said it should be "[l]egal only to save mother, rape or incest."³²² Hence, 80% concluded that abortion ought to be available under some circumstances. At the same time, 55% agreed that abortion is "the same thing as murdering a child. . . ."³²³ Also somewhat surprising is that only 66% agreed that abortion is sometimes the best course in a bad situation,³²⁴ while 80% answering the first question approved the law as is or a law allowing abortion to save the mother or to terminate a pregnancy resulting from rape or incest.³²⁵

Those results suggest obvious inconsistencies. It is possible that a number of people believe abortion is appropriate even though they think it is murder. However, other factors may explain what appear to be inconsistent results. The poll does not take into account the possibility that respondents may not have thought carefully about their own beliefs. Similarly, presumably 14% of those responding believe that abortion should be permitted under certain circumstances but do not believe that a person choosing to have an abortion is making the best decision in a bad situation.

People seeking to use polling data can draw different inferences from the responses. Highlighting answers to the second question allows one to argue that a majority of respondents must have doubts about abortion because they believe that abortion is equivalent to murder. Focusing on that question ignores other evidence which indicates that significant majorities favor abortion under certain circumstances.³²⁶

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *See id.*

325. *See id.*

326. *See* THE GALLUP POLL MONTHLY, Aug. 1996, 33 (poll results accumulated from 1975–1996 showed a range of 75–84% favor legal abortion in at least some circumstances).

Another possible explanation for inconsistent responses may be that the respondents may not be sufficiently informed to be stating "genuine opinions," but only "nonattitudes."³²⁷ Polling the uninformed measures little that is meaningful. For example, some pollsters have designed questions that ask respondents about their views on Supreme Court decisions.³²⁸ At best, such a question measures the limited information the respondent may have about the Supreme Court decision as reported in mainstream media. This information can be notoriously incomplete or inaccurate.³²⁹

Most of the criticisms of polling data focus on problems that arise with specific polls. As demonstrated by extensive social science literature, properly designed and interpreted, polls are meaningful.³³⁰ The millions of dollars spent on polling demonstrate more than mere faith in polling; rather, well designed measurement instruments do generate significant results.³³¹

IV. The Polling Data and Court Doctrine

This section reviews the public opinion polling data³³² over the past twenty-five years that have attempted to measure public views on questions relating to abortion and compares that data with the Supreme Court doctrine developed in Part III of this article. Consistent with this article's hypothesis, the data show significant agreement between Supreme Court doctrine and public opinion.

327. ASHER, *supra* note 319, at 28.

328. See GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1986 49 (1986) (reproducing Survey # 261-G, originally released Feb. 20, 1986). "The U.S. Supreme Court has ruled that a woman may go to a doctor to end pregnancy at any time during the first three months of pregnancy. Do you favor or oppose this ruling?" *Id.* See also GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1989 20 (1989) (reproducing Survey #GO 89024, originally released Jan. 22, 1989). "In 1973 the Supreme Court ruled that states cannot place restrictions on a woman's right to an abortion during the first three months of pregnancy. Would you like to see this ruling overturned, or not?" *Id.*

329. See Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, 74 JUDICATURE, 322, 327 (1991) (discussing the fact that a high level of public awareness of Supreme Court cases does not mean that its rulings are accurately perceived).

330. See BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 246-48 (1993).

331. See *id.*

332. This research attempts to identify the major opinion polls that focus on the abortion question. The Gallup Organization has regularly polled public opinion on abortion and those results are generally well regarded. Hence, these polls receive special attention in this section.

A. A Right to Abortion

1. The Polls Show That Majority Will and Court Doctrine Are in Agreement

Prior to 1975, the year Gallup began its annual survey, the National Opinion Research Center ("NORC") conducted two significant polls, in 1965 and 1973.³³³ Both NORC polls demonstrated overwhelming support for abortion under some circumstances. In 1965, for example, 73% of those polled agreed that abortion should be available if a woman's health was in danger; 59% and 57% supported a woman's right to abortion in a case of rape or serious birth defect, respectively.³³⁴ Public opinion did not support an unrestrained right to abortion. Fewer than a quarter of those polled supported abortion in cases that might be characterized as elective abortions.³³⁵

By 1973, the year *Roe* was decided, 91% of those polled supported abortion in cases of necessity for maternal health, 81% in cases of rape, and 82% in cases of birth defects.³³⁶ A majority favored the right to abortion in cases where low income necessitated the decision.³³⁷ A plurality supported a woman's right to abort in cases where the woman was unmarried and did not want children.³³⁸

After 1975, the most reliable data comes from the Gallup Organization. The standard questions did not provide particularly subtle measurements of public opinion. The standard questions asked whether abortion should be legal under any circumstances, under certain circumstances, or illegal under all circumstances.³³⁹ The results of these polls, taken throughout the post-*Roe* era, indicate that an over-

333. See CRAIG & O'BRIEN, *supra* note 330, at 249.

334. See *id.* at 250.

335. See *id.* Elective abortions are those undergone for reasons of "convenience," rather than for medical reasons. A woman who decides that a child would interfere with her career is having an elective abortion. If she chooses to have an abortion because the pregnancy would have a detrimental effect on her physical or mental health, it would be characterized as medically justified. The term "convenience" is used to distinguish between these two types of abortions. It is not used with intent to trivialize the abortion decision. See also note 352 *infra*.

336. See The General Social Survey 1973, July 1973, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

337. See *id.*

338. See *id.*

339. See GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1980 171 (1980) (reproducing the results of Survey # 159-G, originally released Aug. 28, 1980); GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1981 116 (1981) (reproducing the results of Survey # 173-G, originally released May 31, 1981); GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1983 140 (1983) (reproducing the results of Survey # 217-G, originally released July 31, 1983).

whelming majority of Americans polled support abortion, at least under certain circumstances.³⁴⁰ For example, in 1975, 21% supported abortion under any circumstances and 54% under certain circumstances.³⁴¹ In 1977, the numbers were 22% and 55%; in 1980, 25% and 53%; in 1983, 23% and 58%; and in 1989, 29% and 51%.³⁴² In 1990 and 1992, 31% supported abortion under any circumstance and 53% supported it under certain circumstances; in 1996, the numbers were 25% and 58%.³⁴³

In 1978, Gallup also asked a series of questions intended to measure respondents' views of abortion during different trimesters. The data suggest that support for a woman's right to choose to terminate her pregnancy decreases over the course of the pregnancy.³⁴⁴

Other Gallup polls attempted to frame questions about abortion rights differently. For example, in 1981, pollsters asked whether the respondent approved of the Supreme Court ruling that any woman can end her pregnancy during the first three months.³⁴⁵ Approximately equal numbers approved and disapproved the ruling.³⁴⁶ In 1983, 50% approved of the ruling, while only 43% disapproved.³⁴⁷ In 1986, approval went down to 45%, while disapproval rose to 45%.³⁴⁸ In 1989, 57% opposed overruling *Roe* in response to a slightly different question: "In 1973 the Supreme Court ruled that states cannot place restrictions on a woman's right to an abortion during the first three months of pregnancy. Would you like to see this ruling overturned, or not?"³⁴⁹

2. Interpreting the Opinion Polls

Some of *Roe*'s critics cite public opinion polls to suggest that the public does not support the Supreme Court's abortion rights case law. The authors of *Between Two Absolutes*, for example, note that both pro-

340. See *id.*

341. See THE GALLUP POLL MONTHLY, Aug. 1996, at 33.

342. See *id.*

343. See *id.*

344. See THE GALLUP POLL MONTHLY, July 31, 1983, at 139-41 (reporting the results of Survey # 217-G).

345. See GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1981 112 (1981).

346. See THE GALLUP REPORT, Jan./Feb., 1986, at 18 (asking: "The U.S. Supreme Court has ruled that a woman may go to a doctor to end a pregnancy at any time during the first three months of pregnancy. Do you favor or oppose this ruling?") The results showed that 45% favored the ruling, 45% opposed the ruling and 10% had no opinion. See *id.*

347. See GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1983 139 (1983).

348. See GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1986 49 (1986).

349. GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1989 20 (1989).

choice and pro-life advocates claim that polls support their respective positions.³⁵⁰ They observe that "neither the pro-life nor pro-choice movement has the support of an absolute majority of Americans."³⁵¹ Public attitudes over time have remained remarkably stable. A majority has "hovered near allowing abortion" in four of six circumstances best described as "traumatic circumstances," and between one and two circumstances best described as "elective circumstances."³⁵²

Other authors have found a "strong division in public opinion on abortion,"³⁵³ based on data collected over a ten-year period. These authors relied on responses to a NORC poll, asking whether a married woman ought to be able to obtain a legal abortion if she does not want any more children.³⁵⁴

Roe does give a woman greater freedom in choosing an abortion than the public seems to support. At some points in time, public acceptance of abortion has seemed virtually identical to the protection afforded by *Roe*.³⁵⁵ However, while most of the polls indicate that the public would not support a choice based simply on convenience,³⁵⁶ *Roe* does not allow the state to inquire into the reason for a woman's choice. That is, while *Roe* suggested that some limitations may be imposed during the second trimester, her choice during the first trimester is unfettered.³⁵⁷ Subsequent case law left observers wondering whether a state could impose any significant limitations during the second trimester.³⁵⁸ At a minimum, the Court does not allow a state to force a woman to justify her choice. This leaves her free to choose an abortion for convenience.

Focusing on the area of disagreement between public opinion and the broad right protected in *Roe* ignores significant areas of agreement. For example, when *Roe* was decided, a majority of people polled

350. See COOK ET AL., *supra* note 33, at 37.

351. *Id.*

352. *Id.* at 35-37 (defining traumatic circumstances as: "mother's health, fetal defect, and rape . . ." and elective or "social" circumstances defined as: "poverty, unmarried woman, or a couple who wants no more children").

353. JOHNSON & CANON, *supra* note 64, at 12-13.

354. See *id.* at 13 (asking: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion if she is married and does not want any more children.").

355. See GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1980 171-174 (1980).

356. See e.g. *Public Generally Supports a Woman's Right to Abortion*, THE GALLUP POLL MONTHLY, Aug. 28, 1996, at 32 (finding that only 32% of those polled would support legal abortions in cases where the family cannot afford more children).

357. See discussion *supra* Part II.A.

358. See discussion *supra* Part II.A.

avored the liberalization of abortion laws.³⁵⁹ Numerous polls since that time demonstrate that the overwhelming majority favors more liberal abortion rights than those prevailing prior to *Roe*.³⁶⁰

Further, while a majority may not favor the precise rights afforded in *Roe*, only a small percentage of those polled would have abortion forbidden outright.³⁶¹ For example, in 1988, 17% urged that abortion be illegal under all circumstances.³⁶² Twenty-four percent favored no restrictions on abortion.³⁶³ Of the remaining 57% (those favoring abortion under certain circumstances), an overwhelming majority favored abortion if the pregnancy resulted from rape or incest, or would create a severe health hazard.³⁶⁴ Sixty percent favored the right to abortion in a case in which the baby would be deformed.³⁶⁵ When added to those who favored abortion under any circumstances, about 65% of those sampled favored a right to abortion if the child would be born deformed.³⁶⁶

3. Legislation on Abortion Is Often Anti-Majoritarian

Comparing public opinion with Supreme Court decisions tells only part of the story. When the Court's critics attack the Court as elitist or as anti-majoritarian, they compare the Court with the ideology of the political branches of government.³⁶⁷ However, if one compares the Court's holding in a case like *Roe* with positions taken by the "representative" branches of government, the Court's performance looks closer to public opinion than does that of many elected officials.

For example, in 1981, President Reagan, perhaps as a courtesy to the Christian Coalition that helped him win the presidency,³⁶⁸ supported the Helms-Hyde Human Life Bill.³⁶⁹ Typical of a number of

359. See Maris A. Vinovskis, *Abortion and the Presidential Election of 1976: A Multivariate Analysis of Voting Behavior*, 77 MICH. L. REV. 1750, 1755 (1979).

360. See *id.* at 1753-54.

361. See THE GALLUP MONTHLY, Aug. 1996, at 33 (finding that no more than 22% favored an outright ban of abortion in 20 polls conducted between 1975 and 1996).

362. See *id.*

363. See *id.*

364. See GEORGE GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1988 208-09 (1988) (reporting on a survey released in October 1988 which found that 85% of respondents approved of legal abortions in cases of rape or incest, and 94% approved of legal abortions if the mother's life is endangered).

365. See *id.*

366. See *id.* at 206-08.

367. See *supra* notes 3, 33, 63 and accompanying text.

368. See *supra* notes 94-96 and accompanying text.

369. S. 158, 97th Cong. (1981); H.R. 900, 97th Cong. (1981); see also JOHNSON & CANON, *supra* note 64, at 13 (discussing the 1980 presidential campaign).

bills submitted to Congress in the early 1980s,³⁷⁰ the Human Life Bill contained a provision designed to limit federal court access to plaintiffs bringing certain kinds of cases involving specific federal rights.³⁷¹ Section 1 of the Human Life Bill also attempted to overrule *Roe*³⁷² by providing that "actual human life exists from conception."³⁷³

Had the Human Life Bill been adopted, its proponents hoped that the Court would defer to Congress's determination of when human life began,³⁷⁴ an issue that the Court was unable or unwilling to decide in *Roe*.³⁷⁵ Although the effect of the Human Life Bill was debated, section 1 would almost certainly have extended due process liberty protection to the fetus.³⁷⁶ Were the fetus entitled to due process protection, not only would *Roe* be overruled but the Human Life Bill would also have destroyed the states' ability to legalize abortion.³⁷⁷ This is so because a state law allowing a woman to choose abortion at any time in her pregnancy would implicate the fetus's liberty interest, an interest which could not be denied without due process. Taking a

370. See Baucus & Kay, *supra* note 24, at 992 n.18 (listing several bills on issues such as school prayer and abortion which would have limited the jurisdiction of federal courts).

371. See S. 158, 97th Cong., § 2 (1981); H.R. 900, 97th Cong., § 2 (1981) (providing that no inferior Article III court "shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment" in any case involving state or local laws limiting the right to an abortion); see also Michael Vitiello, *Congressional Withdrawal of Jurisdiction from Federal Courts: A Reply to Professor Uddo*, 28 LOY. L. REV. 61, 61-63 (1982) (noting that the effect of section 2 of the Human Life Bill was to limit the initial determination of the constitutionality of abortion legislation to state courts).

372. See S. 158, 97th Cong., § 1 (1981); H.R. 900, 97th Cong., § 1 (1981) (defining, for Fourteenth Amendment purposes, the beginning of human life); see also Vitiello, *supra* note 371, at 62 (finding that the Human Life Bill would overrule *Roe* in substance because it extended the constitutional protection of liberty to the fetus).

373. S. 158, 97th Cong., § 1 (1981); H.R. 900, 97th Cong., § 1 (1981).

374. See Uddo, *supra* note 33, at 1088 (asserting that the Supreme Court "has, in the past, allowed Congress to differ with it on determinations relevant to the [F]ourteenth [A]mendment by deferring to the congressional view").

375. See *Roe v. Wade*, 410 U.S. 113, 159 (1973) (explaining that the Court will not resolve the question of when life begins because "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer").

376. See Vitiello, *supra* note 371, at 62.

377. See S. 158, 97th Cong., § 1 (1981); H.R. 900, 97th Cong., § 1 (1981) (stating that "for the purpose of enforcing the obligation of the States under the [F]ourteenth [A]mendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception").

fetus's life without some compelling competing interest simply cannot be squared with due process.³⁷⁸

Some efforts by state legislatures would have resulted in similar restrictions. For example, legislation at issue in *Webster* included a preamble that promised protection for fetal life from the moment of conception.³⁷⁹ The Missouri statute included legislative findings that the "life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being."³⁸⁰ Had the Court upheld the preamble, the statute would have had an effect similar to that of the Human Life Bill.

Examples like these, hardly unique in the abortion controversy, demonstrate that elected officials have often acted in direct contravention of majority sentiment.³⁸¹ By contrast, the Supreme Court's long-standing affirmation of *Roe*'s core holding has been supported in whole or in large part by significant majorities of those polled.³⁸² This is demonstrated by various polls that have asked whether the person interviewed favored a decision to overrule *Roe*³⁸³ or to enact a constitutional amendment which would make abortion illegal.³⁸⁴

4. Where Court and Public Opinions Do Not Agree

Insofar as poll results are not entirely consonant with *Roe*, the pollsters have seldom attempted to refine their questions to measure whether those polled would subscribe to the Supreme Court's precise holding in *Roe* in light of other plausible alternatives. For example, most of the Gallup polls suggest that a majority of those polled do not favor abortion as a matter of "convenience," but do if the mother's health, including psychological health, is at risk.³⁸⁵

378. See *Roe*, 410 U.S. at 154 (maintaining that only a compelling state interests can justify abridging a fundamental right, such as a fetus's right to life, which was recognized at conception under the Human Life Bill).

379. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 504 n.4 (1988) (citing Mo. REV. STAT. § 1.205.2 (1986)).

380. *Id.*

381. See JOHNSON & CANON, *supra* note 64, at 151; see also discussion *supra* note 96.

382. See *supra* notes 333–49 and accompanying text.

383. See Larry Hugick, *Abortion: Majority Critical of Abortion Decision, But Most Americans Favor Some New Restrictions*, THE GALLUP REPORT, July 1989, at 5, 8 (reporting that 58% were opposed to overturning the Court decision in *Roe*); see also David W. Moore et al., *Public Generally Supports a Woman's Right to Abortion*, THE GALLUP POLL MONTHLY, Aug. 1996, at 29, 35 (reporting that 59% opposed a constitutional ban on abortion).

384. See Vinovkis, *supra* note 359, at 1761 (reporting that in 1976, 32% of the voters surveyed favored a constitutional amendment making abortion illegal while 56% opposed such an amendment).

385. See discussion *supra* Part IV.A.1.

However, if *Roe* were curtailed to reflect this view, implementation would impose practical problems. For example, would the physician have to discuss with the woman the basis of her decision to determine whether she was making her choice simply out of convenience or because her mental health was at risk? Would the physician be bound by a woman's stated reason? Or, for example, if a woman asserted that her psychological health was at risk, could the physician refuse the abortion because the physician doubted her explanation? Or if a woman stated that she could not afford additional children, a reason that a majority might not support, could a physician nonetheless perform the procedure because the physician believed that the woman's mental health would be adversely affected if she did not have the abortion? Or would the decision be taken out of the hands of the physician entirely? In other words, a scheme that would parallel majority sentiment might impose other impediments that would lead a majority to reject the regulation. Upon closer examination, *Roe* might be the best compromise.

The Supreme Court has modified *Roe* in ways that allow the states to influence a woman's choice on abortion. In early cases, the Court limited the kind of information that a state could require as part of an informed consent provision.³⁸⁶ In effect, the Court required that a state remain neutral in its position towards a woman's right to terminate her pregnancy and could not "intimidate women into continuing pregnancies."³⁸⁷ More recently, the Court has found that a state has a "profound interest in potential life," and may take measures "to persuade the woman to choose childbirth over abortion."³⁸⁸ Under *Casey*, a state is free to discourage abortions for convenience.³⁸⁹ In fact, a state may even attempt to discourage abortions in situations where a majority of Americans believe that the woman's right ought to be unfettered. For example, a majority favors an unfettered right to an abortion when the child may be born with a deformity. However, under current Court doctrine, the state is free to discourage the mother from electing an abortion in this circumstance.

Despite the assertions by critics, the Court has not deviated widely from majoritarian sentiment. In fact, by comparison to the policies of

386. See discussion *supra* Part II.B.

387. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986).

388. *Planned Parenthood of S.E. Pa. v. Casey*, 545 U.S. 833, 878 (1992).

389. See discussion *supra* Part II.B.

Presidents Reagan and Bush and to some legislatures,³⁹⁰ the Court has held a steady course that, over time, closely mirrors the sentiment of a majority of Americans.

B. Informed Consent and the Twenty-four Hour Waiting Period

Polling data concerning the related issues of informed consent and a twenty-four hour waiting period are illuminating. Initially at odds with popular sentiment, the Court's view has moderated towards popular opinion.

From the beginning of its abortion case law, the Supreme Court has upheld informed consent provisions—at least where those provisions leave to the physician the decision of what information to communicate.³⁹¹ In addition, it has upheld the twenty-four hour waiting period as “a reasonable measure to implement the State's interest in protecting the life of the unborn.”³⁹² Pollsters have extensively measured the public's support for an informed consent requirement and a twenty-four hour waiting period. The results have been consistent over time, with a large majority favoring these kinds of requirements.³⁹³ For example, in 1992, 86% of those responding to a Gallup poll favored a requirement that a doctor inform a patient of the alternatives to abortion prior to the procedure.³⁹⁴ The percentage favoring such a requirement remained the same in 1996.³⁹⁵

With regard to a twenty-four hour waiting period, Gallup polls reveal support ranging from 73 to 74% approval ratings.³⁹⁶ Other

390. See *supra* notes 367–84 and accompanying text.

391. See discussion *supra* Part II.B.

392. *Casey*, 476 U.S. at 885.

393. Compare Larry Hugick & Lydia Saad, *Abortion: Public Support Grows for Roe v. Wade*, THE GALLUP POLL MONTHLY, Jan. 1992, at 5, 7 (reporting that 86% favor a law requiring doctors to inform patients about alternatives to abortion before performing the procedure; 73% favor a law requiring women seeking abortions to wait 24 hours before having the procedure done), with David W. Moore et al., *supra* note 383, at 29, 34 (reporting that 86% favor a law requiring doctors to inform patients about alternatives to abortion before performing the procedure; 74% favor a law requiring women seeking abortions to wait twenty-four hours before having the procedure done).

394. See Hugick & Saad, *supra* note 393, at 5, 7 (reporting that 86% favor a law requiring doctors to inform patients about alternatives to abortion before performing the procedure).

395. See Moore, et al., *supra* note 383, at 29, 34 (reporting that 86% favor a law requiring doctors to inform patients about alternatives to abortion before performing the procedure).

396. See Hugick & Saad, *supra* note 393, at 5, 7 (reporting that 73% favor a law requiring women seeking abortions to wait twenty-four hours before having the procedure done); see also Moore, et al., *supra* note 383, at 29, 34 (reporting that 74% favor a law

polls have produced similar results. In 1989, the Gordon S. Black Corporation found that 63% favored a twenty-four hour waiting period while only 28% opposed this.³⁹⁷ In 1992, *Times Mirror* found 81% in favor of such a limitation.³⁹⁸ In 1994, the Yankelovich Organization found that 73% favored a twenty-four hour waiting period before a doctor can administer RU-486, the "morning after" pill.³⁹⁹ In 1998, a *CBS News-New York Times* poll found that 79% of those polled favored a twenty-four hour waiting period for women seeking an abortion.⁴⁰⁰

Hence, as the Court's early rulings on these issues were not supported by majority sentiment,⁴⁰¹ those rulings did not survive later reconsideration by the Court. Today, the Court's holdings are in accord with popular sentiment on the questions of informed consent and a mandatory waiting period.⁴⁰²

C. Spousal Notification and Consent

A major area of disagreement between Supreme Court doctrine and public opinion is that of spousal consent and notification. For over twenty years, the Court has rejected statutes imposing either spousal consent or notification provisions, while significant majorities of those polled support such requirements.⁴⁰³

Gallup polls during the 1990s found at least 70% of those polled favored spousal notification.⁴⁰⁴ Lesser-known polls have reported similar findings. A 1989 Gordon S. Black poll found that 63% of those polled favored a state law which would require spousal notification.⁴⁰⁵

requiring women seeking abortions to wait twenty-four hours before having the procedure done).

397. See Gordon S. Black, U.S.A. Today, Dec. 26, 1989, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

398. See People, The Press & Politics Campaign '92, May 8, 1992, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

399. See Time, CNN, Yankelovich Partners Inc., May. 20, 1994, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

400. See CBS News, New York Times Poll, Jan. 15, 1998, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

401. See discussion *supra* Part II.B.

402. See discussion *supra* Part II.B.

403. See discussion *supra* Part II.C.

404. See Hugick & Saad, *supra* note 393, at 5, 7 (reporting that 73% favored a law requiring that the husband of a married woman be notified if she decides to have an abortion); see also Moore et al., *supra* note 383, at 29, 35 (reporting that 70% favored a law requiring that the husband of a married woman be notified if she decides to have an abortion).

405. See Gordon S. Black, USA Today, July 5, 1989, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

Six months later, the same group found that 57% of those surveyed supported such a law.⁴⁰⁶ Other groups, both those with ties to the Right to Life movement and those without ideological ties, have also found that a significant majority favor spousal notification.⁴⁰⁷

Perhaps more surprising, at least two polls have found majority support for a law that would require spousal consent as well. A 1989 *Los Angeles Times* poll found that 53% of those sampled favored such a requirement.⁴⁰⁸ A similar *Washington Post* poll conducted in 1992 found that 63% favored spousal consent as a precondition for an abortion.⁴⁰⁹

The disparity between Supreme Court doctrine and public opinion over spousal rights is significant and has not changed over time. However, it is the only area of significant disagreement that has remained consistent over time.

D. Parental Notification and Consent

Not long after *Roe*, the Supreme Court struck down Missouri's blanket parental consent requirement.⁴¹⁰ The Court suggested the state might tailor a parental consent law to serve legitimate interests in safeguarding the family unit and parental authority.⁴¹¹ Since then, the Court has reviewed numerous state laws regulating a minor's right to have an abortion. The Court has upheld the law in question, whether it involved parental consent or merely notification, as long as the law provided for a judicial bypass for certain minors.⁴¹²

Gallup has found consistent support of about 70% for a parental consent requirement.⁴¹³ Those findings have been replicated by nu-

406. See Gordon S. Black, USA Today, Dec. 26, 1989, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

407. See Wirthlin Group, Jan. 1992, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File (reporting that 74% favored a law requiring a woman's husband be notified before an abortion is performed). Wirthlin Group is a full service research provider founded by Richard Wirthlin. Wirthlin's most notable clients are former President and California Governor Ronald Reagan as well as The National Right to Life Committee. He is widely recognized as one of the best Republican pollsters in the country today.

408. See Los Angeles Times, March 1989, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

409. See Washington Post, April 1992, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

410. See *supra* notes 204-09 and accompanying text.

411. See *supra* note 210 and accompanying text.

412. See discussion *supra* Part II.D.

413. See Hugick & Saad, *supra* note 393, at 5, 7 (reporting that 70% favor a law requiring women under 18 to get parental consent for any abortion); see also Moore et al., *supra*

merous groups.⁴¹⁴ Almost all of the polls have found support for a requirement of parental consent to run close to or above 70%;⁴¹⁵ only a 1990 poll found support under 60%, but even there, 57% of those polled supported a parental consent requirement.⁴¹⁶

Whether the Supreme Court doctrine and polling data are entirely consistent is open to debate, the reason being that the pollsters have not attempted to measure whether those polled would support the judicial bypass exception. This should not, however, obscure the fact that the Court has upheld parental consent laws, a holding that receives overwhelming public support.

E. Use of Public Funds

Pollsters have come to inconsistent results in efforts to measure public opinion about public funding of abortions. While the Supreme Court doctrine has consistently rejected the argument that government has an obligation to fund abortions,⁴¹⁷ public opinion has varied depending on the wording of the question asked.

A number of major polls seem to agree with Supreme Court doctrine. For example, one Gallup poll found that 54% favored a state's right to prohibit abortions "in public hospitals unless the abortion is required to save a woman's life."⁴¹⁸ A *Los Angeles Times* poll reported that 56% favored that part of the *Webster* decision which upheld a state's right to impose such a prohibition.⁴¹⁹ Another *Los Angeles Times* poll found that 54% of those polled opposed a reformed health plan that would provide funding for abortions.⁴²⁰

By contrast, a number of polls have found that a majority oppose laws which would ban public hospitals from performing abortions. A

note 383, at 29, 34 (reporting that 74% favor a law requiring women under 18 to get parental consent for any abortion).

414. See People, The Press & Politics Campaign '92, May 8, 1992, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File; American National Election Study 1992, April 1993, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File; Time, CNN, Yankelovich Clancy Shulman, July 5, 1990, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

415. See *id.*

416. See Time, CNN, Yankelovich Clancy Shulman, July 5, 1990, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

417. See discussion *supra* Part II.E.

418. Hugick, *supra* note 383, at 5, 10 (reporting that 54% favored and 43% opposed a law not allowing abortions to be performed in public hospitals).

419. See *Los Angeles Times*, July 1989, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

420. See *Los Angeles Times*, Oct. 1993, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

1989 *USA Today* poll reported that 51% of those questioned opposed such a prohibition, while 44% supported the suggested ban.⁴²¹ A similar poll concluded that 64% of the sample opposed a legal restriction which would prohibit "abortions from being performed in all public hospitals and clinics."⁴²² Finally, a *CBS News-New York Times* poll found that 57% opposed a prohibition against public employees or public hospitals from performing abortions.⁴²³

A possible explanation for the inconsistent results is that the questions used in the various polls frame the issue differently. For example, some of those responding to the *CBS News-New York Times* poll who opposed a limitation on abortions being performed in a public hospital may have answered differently if they had been asked whether they supported a requirement that public hospitals dedicate resources to providing abortions. Neither the 1998 *USA Today* poll nor the *CBS News-New York Times* poll focused on the fact that requiring a public hospital and public employees to perform abortions requires the local government entity to fund those abortions. Had the questions been framed so that this premise could be understood, inconsistent results may not have been produced.

Conclusion

The focus of this article has been on one criticism leveled at the Supreme Court: that its activism, in the words of Robert Bork, "is likely to represent an elite minority's sentiment."⁴²⁴ This article has attempted to determine whether the Court's abortion doctrine is in fact anti-majoritarian. Quite to the contrary, the data suggest that Supreme Court case law in large part reflects majoritarian sentiment.

In recent years, conservatives have renewed a time worn attack on the Court that it is anti-majoritarian.⁴²⁵ In the words of one critic, the Court is a "regular participant in the 'culture wars' that divide Americans on so many social issues. And in these ongoing conflicts, the Court is a systematic partisan for one side—the liberal side."⁴²⁶ That kind of powerful rhetoric can cast doubt on the Court's legitimacy

421. See Gordon S. Black, *USA Today*, July 5, 1989, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

422. Time, CNN, Yankelovich Clancy Shulman, July 10, 1989, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

423. See CBS News, *New York Times*, July 1989, *Public Opinion Online*, available in LEXIS, Market Library, RPOLL File.

424. BORK, *supra* note 3, at 17.

425. See discussion *supra* Part I.A.

426. Rabkin, *supra* note 4, at 105.

and has at times led to a call for limitations on the power of federal courts.

Sustained attacks on the Court's legitimacy may undercut the Court's ability to do substantial justice in otherwise unpopular cases. The traditional defense of the Court, that it was intended to protect "discrete and insular minorities," has its limitations. Over time, the public will not continue to support a court that repeatedly frustrates popular will.⁴²⁷

While the Constitution was never intended to create a system of direct democracy, it built in significant limitations that prevent Article III courts from becoming politically unaccountable. Article III creates an independent judiciary with the ability to do justice in individual cases. At the same time, the political branches of government can influence the direction of the Court through the appointment process.⁴²⁸

Comparison of the Supreme Court's abortion case law with dozens of public opinion polls spanning twenty-five years demonstrates that the Court has not abandoned the majority in favor of a political elite. In almost every area, Court doctrine and public opinion show significant similarity. In fact, public opinion and Supreme Court doctrine have often shown far greater similarity than do the views of the Court's critics.

427. See Dahl, *supra* note 34, at 283.

428. See *supra* notes 50–62 and accompanying text.